133-670

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1005. ~~012~~ 354 87

WILLIAM H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA, APPELLANT,

vs.

ROBERT T. K. BAIN, GEORGE M. BAIN, JR., AND JAMES G. BAIN, LATE PARTNERS UNDER THE NAME AND STYLE OF BAIN & BROTHER; AND JOHN T. GRIFFIN, WILLIAM W. OLD AND JOHN B. JENKINS, TRUSTEES, ET AL.

FILED SEPTEMBER 21, 1886.

No. 1181. ~~151~~ 126 198

JOHN T. GRIFFIN, WILLIAM W. OLD AND JOHN B. JENKINS, TRUSTEES, &c., APPELLANTS,

vs.

WILLIAM H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VA.

FILED OCTOBER 16, 1886.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1005.

WILLIAM H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA, APPELLANT,

vs.

ROBERT T. K. BAIN, GEORGE M. BAIN, JUNIOR, AND JAMES G. BAIN, LATE PARTNERS UNDER THE NAME AND STYLE OF BAIN & BROTHER; AND JOHN T. GRIFFIN, WILLIAM W. OLD, AND JOHN B. JENKINS, TRUSTEES, ET AL.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

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vs.

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1 NORFOLK, VA., *August 28th*, 1886.

It is hereby agreed between the counsel for the parties, both plaintiff and defendants, in the suit of Wm. H. Peters, receiver, &c., *vs.* Bain & Bro., and their trustees, that the following portions of the record in said suit may be omitted from the transcript of said record made up by the clerk to be transmitted to the clerk of the Supreme Court of the United States, to wit:

1. All forms of process or summons or notices of motions.
2. The original bill and answers thereto, inasmuch as the same are fully set out in the amended bill and the answers thereto.
3. The certificate of organization of the Exchange National Bank.
4. The monthly reports of the trustees of Bain & Bro., the consolidated report of said trustees, filed May 21st, 1886, being deemed sufficient.
5. The inventory of the estate, real and personal, of Bain & Bro., filed June 16th, 1885, and the short supplemental inventory.

But in case any of the said papers above set out should hereafter for any cause be deemed important the plaintiff may produce, or may be required to produce, them by a supplemental transcript.

THEODORE S. GARNETT,
Of Counsel for Plaintiff.
RICHARD WALKE.
Of Counsel for Trustees.

1⅛ Pleas at the court-rooms of the circuit court of the United States for the eastern district of Virginia, at Norfolk, in said district

Be it remembered that on the 2d day of May, A. D. 1885, William H. Peters, receiver of the Exchange National Bank of Norfolk, as plaintiff, filed his bill against Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners, doing business under the name and style of Bain & Bro., and also as constituting the late firm of Bain & Bro., and against John T. Griffin, William W. Old, and John B. Jenkins, as trustees, and others, defendants.

And thereafter, to wit, on the 5th day of August, A. D. 1885, by leave of court, the said plaintiff filed his amended bill against the said defendants, which said amended and original bills are in the words and figures following, to wit:

1¼ In the Circuit Court of the United States for the Eastern District of Virginia. In Chancery.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk, Plaintiff,
vs.
BAIN & BRO. and Others, Defendants.

To the honorable judges of the said court:

William H. Peters, receiver of the Exchange National Bank of Norfolk, plaintiff, brings this his amended bill against Robert T. K.

Bain, George M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners doing business under the name and style of Bain & Bro.; and Robert T. K. Bain and Fanny S. Bain, his wife; and James G. Bain and Emily, his wife; and George M. Bain, Jr., and Willie F. C. Bain, his wife; and John T. Griffin, William W. Old, and John B. Jenkins, as trustees under a deed of trust bearing date the sixth day of April, 1885, as herinafter set forth; and Annie S. Hall, Wright B. Carney, Joseph T. Duke, W. R. Old, Charles E. Jenkins, Jones, Lee & Co., John T. King & Bro., the employees of Bain & Bro.; the employees of George T. Wallace, and the employees of Wallace & Son, to the plaintiff unknown, and all the depositors of the said firm of Bain & Bro., at their banking-house, in the city of Portsmouth, whose names are to the plaintiff unknown; and George Tait, Alexander & Powell, Riddick & Richardson, and Furman & Page, and all others the creditors of the grantors mentioned as secured in the said deed of trust, whose names are to the plaintiff unknown, defendants.

And thereupon complaining, the plaintiff shows unto your honors:

1. That on the 2d day of May, 1885, the plaintiff filed his original bill in this cause, alleging as therein set forth and praying for the relief therein stated, and, among other things, that he might be allowed to amend his said bill as occasion might require; a printed copy of said original bill and of the exhibits therewith filed is here set forth in the words and figures following, to wit:

1½ *Bill. Filed May 2nd*, 1885.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk,

vs.

BAIN & BRO. *et als.*

To the honorable the judges of the circuit court of the United States for the eastern district of Virginia:

William H. Peters, receiver of the Exchange National Bank of Norfolk, plaintiff, brings this his bill against Robert T. K. Bain, Geo. M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners doing business under the name and style of Bain & Bro., and also as constituting the late firm of Bain & Bro.; and Robert T. K. Bain and Fanny S. Bain, his wife; and George M. Bain, Jr., and Willie F. C. Bain, his wife; and James G. Bain and Emily, his wife; and John T. Griffin, William W. Old, and John B. Jenkins, as trustees under a deed of trust bearing date the sixth day of April, 1885, as hereinafter set forth; and Annie S. Hall, Wright B. Carney, Joseph T. Duke, W. R. Old, Charles E. Jenkins, Jones, Lee & Co., John T. King & Bro., the employees of Bain & Bro., of George T. Wallace, and of Wallace & Son, to the plaintiff unknown; and the said George T. Wallace and John G. Wallace, individually and as partners, trading under the name and style of Wallace & Son, and all the depositors of the said firm of Bain & Bro. at their banking-house in the city

of Portsmouth, whose names are to the plaintiffs unknown; and George Tait, Alexander & Powell, Riddick & Richardson, and Furman & Page, and all others the creditors of the grantors mentioned as secured in the said deed of trust, whose names are to the plaintiffs unknown, defendants.

And thereupon complaining the plaintiff shows unto your honors the following case:

I. That on and prior to the first day of January, 1870, the Exchange National Bank of Norfolk was a corporation created
2 and existing for the purpose and engaged in the business of banking, having its offices, where its operations of discount and deposit were carried on, at the city of Norfolk, in said district.

That said corporation was created and organized under an act of the Congress of the United States of America entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," and subsequent acts in addition to or amendatory thereof, with a capital stock which had been increased from time to time until, at the date next herein mentioned, the said capital stock was three hundred thousand dollars, divided into shares of the par value of one hundred dollars each.

That, from its creation and organization and thereafter continuously until on or about the 2nd day day of April, 1885, the said bank accepted, exercised, and enjoyed the various powers and privileges granted by said acts of Congress, and continued to carry on the business of banking at the city of Norfolk aforesaid.

That on the 2nd day of April, 1885, at the said City of Norfolk, the said bank closed its doors, and then and there suspended and discontinued its business of banking, and has not resumed the same.

That on the 10th of April, 1885, the Comptroller of the Currency of the United States, H. W. Cannon, having become satisfied that the said bank was in default, duly appointed the plaintiff, William H. Peters, receiver of said bank.

That afterwards, to wit, on the 11th day of April the plaintiff at said district accepted said office of receiver, qualified and gave bond as such, and entered upon the business thereof and took possession of the books, records, and assets of every description of said bank, and from thence hitherto has been and still is engaged in the collection of all debts, dues, and claims belonging to said bank, and since then has been continuously and still is discharging the duties devolved upon him by law by reason of his said office as such receiver.

II. That it appears by the books and records of said bank that The Exchange National Bank of Norfolk has been transacting business for several years past with the following-named persons as its officers and directors, to wit:

John B. Whitehead, president; James G. Bain, vice-president; George M. Bain, Jr., cashier; James H. Toomer, assistant cashier, and the following directors, to wit:

John B. Whitehead, James G. Bain, R. T. K. Bain, R. H. McDonald, Orlando Windsor, C. E. Jenkens, and Thomas A. Bain, all of whom had served as such for several years past, and were last re-

elected directors of said bank on the 13th day of January, 1885, and were and are residents of said district, with the exception of R. H. McDonald, who is a resident of the State of California.

That on the 8th day of July, 1870, George M. Bain, Jr., was elected cashier of said bank, and since that date has continuously occupied that position; and that on the 18th day of July, 1870, John B. Whitehead was elected president of said bank vice Gilbert
3 C. Walker, resigned, and since that date has continuously occupied that position, and the said George M. Bain, Jr., and John B. Whitehead since the dates aforesaid have practically exercised exclusive control and management of all the affairs and business of the said bank, and of all the loans, discounts, and deposits made at the said bank; the directors of the said bank negligently and faithlessly and in violation of their duty as such permitting the sole care and management of the said bank's affairs to be exercised by the said president and cashier.

III. That at the city of Portsmouth, in said district, on the 1st day [of] April, 1885, and for a long time prior thereto, Robert T. K. Bain, George M. Bain, Jr., James G. Bain, and Thomas A. Bain constituted a partnership and conducted business as bankers and brokers under the firm name and style of Bain & Bro., and that on or about the —— day of ——, 18—, the said Thomas A. Bain departed this life, and the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, as surviving partners of themselves and Thomas A. Bain, deceased, continued to carry on and conduct their said business of banking under the firm name and style of Bain & Bro. until the 2d day of April, 1885, when they closed the doors of their said banking-house, in the said city of Portsmouth, at the same moment with the suspension of the Exchange National Bank of Norfolk, and then and there suspended payment and discontinued their said business of banking, and have not resumed the same; that for several years past the said firm of Bain & Bro. have been at all times indebted to the Exchange National Bank in large sums of money borrowed originally from said bank on their simple notes, payable to their own order, and without any other endorsement or security whatsoever; that immediately before the suspensions aforesaid, to wit, on or about the 31st day of March, 1885, the Exchange National Bank held and owned the notes of the said Bain & Bro., as aforesaid, being the last renewals of their former notes, to the immense sum of six hundred and twenty-five thousand ($625,000) dollars, for which the said Bain & Bro. had received the moneys of the said bank to that extent, the said notes having been discounted for them by said bank; and on the 2d day of April, 1885, the date of the suspensions aforesaid, the said bank held of their said notes, and still holds, so discounted by the said bank for Bain & Bro., the sum of three hundred and twenty-five thousand dollars, the former amount having been reduced and withdrawn to that extent on or about the said 31st day of March, 1885, in the manner and by means of an agreement of that date, hereinafter more fully set forth and explained.

And in addition to the said sum of $325,000 for which the said Bain & Bro. were liable as makers, they had endorsed and redis-

counted at the said bank and were liable as endorsers on certain notes made by George M. Bain, Jr., Wallace & Son, and others, amounting in the aggregate to the immense sum of five hundred and eighty-one thousand nine hundred and seventy-one dollars forty-nine cents ($581,971.49), for which large indebtedness, amounting in the aggregate to the sum of nine hundred and six thousand nine hundred and seventy-one dollars and forty-nine cents ($906,971.49), the said Exchange National Bank holds no security whatsoever, and which debt the said Bain & Bro. have attempted, by a fraudulent conspiracy and design, to render absolutely
4 worthless to the said bank, as hereinafter specifically detailed and charged; and the said Bain & Bro. are further indebted to the said bank in the sum of two hundred and eleven dollars, evidenced by their three due bills, one for the sum of one hundred and ninety-two ($192.00) dollars (being for forty pounds sterling), dated October 13th, 1883, and the other two for nine ($9.00) dollars and ten ($10.00) dollars, respectively, without date; and the said Exchange National Bank also holds checks drawn by various depositors of the said Bain & Bro., which were received by the bank on the 1st day of April, 1885, and are unpaid because of the suspension of the said firm on the 2d day of April, 1885, as aforesaid, amounting together to the further sum of three thousand four hundred and seven dollars ($3,407.68) and sixty-eight cents.

IV. That prior to the said 2d day of April, 1885, the said George M. Bain, Jr., was indebted to the Exchange National Bank in the following amounts, to wit: On joint account with John B. Whitehead in the sum of one hundred and eighty-four thousand one hundred and seventy-six dollars ($184,176.21) twenty-one cents, evidenced as follows: One note due December 29th, 1884, for the sum of thirteen hundred and forty-six dollars ($1,346.51) and fifty-one cents; one note due July 11th, 1885, for thirty-one thousand two hundred ($31,200) [dollars], and one note due July 15th, 1885, for eleven thousand five hundred ($11,500) dollars; also one demand note for the sum of seventy-nine thousand five hundred and fifty ($79,550) dollars; also by overdraft on joint account with the said John B. Whitehead at the said bank in the sum of sixty thousand five hundred and sixty-nine dollars ($60,569.47) and forty-seven cents, and by due bills amounting to the sum of ten dollars ($10.23) and twenty-three cents; and the said George M. Bain, Jr., was further indebted, on the 2d day of April, 1885, on his individual account, in the sum of thirty-six thousand eight hundred and sixty ($36,860.09) dollars and nine cents, evidenced by his certain notes, as sole maker, as follows: One note due April 2d, 1885, for the sum of thirteen thousand dollars ($13,000); two notes, each for the sum of nine thousand dollars, due May 3d, 1885, and June 3d, 1885, respectively, and by overdraft on his account at said bank in the sum of five thousand eight hundred and twenty-three dollars ($5,823.09) and nine cents, and by due bills amounting to the sum of thirty-five dollars ($35.50) and fifty cents; and the said George M. Bain, Jr., was also, and still is, liable to the said bank as endorser to the extent of thirty-four thousand seven hundred and thirty-eight dollars

and seventy-three cents on notes discounted and held by said bank as follows: A note for the sum of twenty-eight thousand five hundred and ninety-eight dollars and seventy-three cents, due August 6th, 1885; a note of G. A. G. Scott for one hundred and forty dollars, due May 4th, 1885; a note of S. S. Nottingham for the sum of three thousand ($3,000) dollars, due June 21st, 1885, and a note of James G. Bain for the sum of three thousand ($3,000) dollars, due ——, 1885.

V. That the said James G. Bain, on the 2d day of April, 1885, was indebted individually to the said Exchange National Bank, as maker of the said last-named note, for the sum of three thousand ($3,000) dollars, and as a member of the firm of Bain & Bro., endorsers on the several notes hereinbefore mentioned, for the large sums of money set forth.

5 VI. That among the notes held by the Exchange National Bank on which the said Bain & Bro. are endorsers and which are discounted by them at said bank are the following five notes made by Wallace & Son each for the sum of sixteen thousand dollars, due and maturing as follows: April 7th, 1885, April 21st, 1885, May 20th, 1885, June 4th, 1885, and June 13th, 1885, respectively, and two other notes made by George T. Wallace and endorsed by J. G. Wallace, one for the sum of ten thousand dollars and the other for fifteen thousand dollars, falling due on the 13th June, 1885, and 20th July, 1885, respectively, and for which no collateral security is held by the said bank.

The said George T. Wallace and John G. Wallace, father and son, are merchants, lumber getters, farmers, and partners in trade under the name and style of Wallace & Son, and for several years past have been associated financially and doing business as customers with the said Bain & Bro., and through their intimate relations and large business dealings with Bain & Bro., and by means of the endorsement of said firm were permitted and allowed by the said George M. Bain, Jr., cashier, and R. T. K. Bain and James G. Bain, directors, to obtain these large sums of money by the discount of their said bank, amounting together to the sum of one hundred and five thousand ($105,000) dollars, or more, without any security therefor.

And, as part and parcel of the scheme of fraud and conspiracy hereinbefore charged, the said Bain & Bro. on the same day of the execution by them of deed of trust, as hereinafter set out and charged, cause and procured to be made and executed to themselves a deed of bargain and sale by the said George T. Wallace and wife and John G. Wallace and wife, who acknowledged the same on the 6th day of April, 1885, the said deed being antedated and made to appear as dated on the 4th day of April, 1885, conveying to the said Bain & Bro., in consideration of the sum of one hundred and fifty-one thousand and eight hundred dollars ($151,800), with general warranty, several large and valuable farms and tracts of land situated in the county of Norfolk, Virginia, and large and valuable quantities of personal property, merchandise, lumber, wood, and material used in their business, and all the personal property of

every kind and character whatsoever of the said George T. Wallace and John G. Wallace, either as individuals or as partners doing business as Wallace & Son. (Copy of said deed is herewith filed as Exhibit No. 1.)

And, as a part of the same scheme and fraudulent design against the said Exchange National Bank, the said Bain & Bro., at the same time and on the same occasion, to wit:

On the 6th day of April, 1885, at the dwelling-house of the said R. T. K. Bain, the said John G. Wallace and George T. Wallace, being then and there assembled with their attorney, counsel, and adviser, and other counsel assisting therein, caused to be executed a certain other deed purporting to be a deed of bargain and sale of said Wallace & Son to the Richmond Cedar Works (Limited), conveying to the said grantees vast quantities of land, both farming and timbered lands, in tracts containing many thousands of acres, situated in Virginia and North Carolina, as will be more particularly seen by reference to the said deed, which appears dated the 3d day of April,
6 1885, and admitted to record in the clerk's office of Norfolk county court on the 7th day of April, 1885. (Copy of said deed is herewith filed as Exhibit No. 2.)

The property mentioned in these two said deeds, with the exceptions therein specially stated, includes all the property of the said Wallace & Son, individually and as partners.

The plaintiff here avers that at the time of the making of the said deeds the said Wallace & Son were liable as endorsers on eighteen several notes of the Richmond Cedar Works, Limited, aggregating the sum of one hundred and thirty-nine thousand one hundred and one dollars and eighty cents, then shortly maturing, which said notes were all discounted and held by the Exchange National Bank.

And thus the said Bain & Bro., well knowing the condition of the said Wallace & Son, who had conveyed to the Richmond Cedar Works (which was a limited partnership composed of the said Wallace & Son, owning two-fifths thereof; the said Bain & Bro. owning one-fifth thereof, —— Parrish one-fifth, and John Ott one-fifth) all their property save that mentioned in their deed to Bain & Bro., accepted and received from the said Wallace & Son the deed aforesaid of April 6th, 1885, so procured to be made, as aforesaid, with intent to hinder, delay, and defraud the Exchange National Bank of the immense debt owing it by Wallace & Son, and immediately reconveyed the same property therein mentioned to the said trustees, in furtherance of their fraudulent intent, as hereinafter is more particularly alleged and charged.

That the said R. T. K. Bain, George M. Bain, Jr., and James G. Bain, who are brothers and partners of the late firm of Bain & Bro., are the identical individuals hereinbefore mentioned as being officers and directors of the Exchange National Bank of Norfolk, to wit, James G. Bain, vice president and director; R. T. K. Bain, a director, and Geo. M. Bain, Jr., the cashier of said bank.

From all which it appears, and the plaintiff avers and charges, that the said George M. Bain, Jr., cashier, as aforesaid, and the said R. T. K. Bain and James G. Bain, directors, as aforesaid, of the Ex-

and seventy-three cents on notes discounted and held by said bank as follows: A note for the sum of twenty-eight thousand five hundred and ninety-eight dollars and seventy-three cents, due August 6th, 1885; a note of G. A. G. Scott for one hundred and forty dollars, due May 4th, 1885; a note of S. S. Nottingham for the sum of three thousand ($3,000) dollars, due June 21st, 1885, and a note of James G. Bain for the sum of three thousand ($3,000) dollars, due ——, 1885.

V. That the said James G. Bain, on the 2d day of April, 1885, was indebted individually to the said Exchange National Bank, as maker of the said last-named note, for the sum of three thousand ($3,000) dollars, and as a member of the firm of Bain & Bro., endorsers on the several notes hereinbefore mentioned, for the large sums of money set forth.

5 VI. That among the notes held by the Exchange National Bank on which the said Bain & Bro. are endorsers and which are discounted by them at said bank are the following five notes made by Wallace & Son each for the sum of sixteen thousand dollars, due and maturing as follows: April 7th, 1885, April 21st, 1885, May 20th, 1885, June 4th, 1885, and June 13th, 1885, respectively, and two other notes made by George T. Wallace and endorsed by J. G. Wallace, one for the sum of ten thousand dollars and the other for fifteen thousand dollars, falling due on the 13th June, 1885, and 20th July, 1885, respectively, and for which no collateral security is held by the said bank.

The said George T. Wallace and John G. Wallace, father and son, are merchants, lumber getters, farmers, and partners in trade under the name and style of Wallace & Son, and for several years past have been associated financially and doing business as customers with the said Bain & Bro., and through their intimate relations and large business dealings with Bain & Bro., and by means of the endorsement of said firm were permitted and allowed by the said George M. Bain, Jr., cashier, and R. T. K. Bain and James G. Bain, directors, to obtain these large sums of money by the discount of their said bank, amounting together to the sum of one hundred and five thousand ($105,000) dollars, or more, without any security therefor.

And, as part and parcel of the scheme of fraud and conspiracy hereinbefore charged, the said Bain & Bro. on the same day of the execution by them of deed of trust, as hereinafter set out and charged, cause and procured to be made and executed to themselves a deed of bargain and sale by the said George T. Wallace and wife and John G. Wallace and wife, who acknowledged the same on the 6th day of April, 1885, the said deed being antedated and made to appear as dated on the 4th day of April, 1885, conveying to the said Bain & Bro., in consideration of the sum of one hundred and fifty-one thousand and eight hundred dollars ($151,800), with general warranty, several large and valuable farms and tracts of land situated in the county of Norfolk, Virginia, and large and valuable quantities of personal property, merchandise, lumber, wood, and material used in their business, and all the personal property of

every kind and character whatsoever of the said George T. Wallace and John G. Wallace, either as individuals or as partners doing business as Wallace & Son. (Copy of said deed is herewith filed as Exhibit No. 1.)

And, as a part of the same scheme and fraudulent design against the said Exchange National Bank, the said Bain & Bro., at the same time and on the same occasion, to wit:

On the 6th day of April, 1885, at the dwelling-house of the said R. T. K. Bain, the said John G. Wallace and George T. Wallace, being then and there assembled with their attorney, counsel, and adviser, and other counsel assisting therein, caused to be executed a certain other deed purporting to be a deed of bargain and sale of said Wallace & Son to the Richmond Cedar Works (Limited), conveying to the said grantees vast quantities of land, both farming and timbered lands, in tracts containing many thousands of acres, situated in Virginia and North Carolina, as will be more particularly seen by reference to the said deed, which appears dated the 3d day of April,
6 1885, and admitted to record in the clerk's office of Norfolk county court on the 7th day of April, 1885. (Copy of said deed is herewith filed as Exhibit No. 2.)

The property mentioned in these two said deeds, with the exceptions therein specially stated, includes all the property of the said Wallace & Son, individually and as partners.

The plaintiff here avers that at the time of the making of the said deeds the said Wallace & Son were liable as endorsers on eighteen several notes of the Richmond Cedar Works, Limited, aggregating the sum of one hundred and thirty-nine thousand one hundred and one dollars and eighty cents, then shortly maturing, which said notes were all discounted and held by the Exchange National Bank.

And thus the said Bain & Bro., well knowing the condition of the said Wallace & Son, who had conveyed to the Richmond Cedar Works (which was a limited partnership composed of the said Wallace & Son, owning two-fifths thereof; the said Bain & Bro. owning one-fifth thereof, —— Parrish one-fifth, and John Ott one-fifth) all their property save that mentioned in their deed to Bain & Bro., accepted and received from the said Wallace & Son the deed aforesaid of April 6th, 1885, so procured to be made, as aforesaid, with intent to hinder, delay, and defraud the Exchange National Bank of the immense debt owing it by Wallace & Son, and immediately reconveyed the same property therein mentioned to the said trustees, in furtherance of their fraudulent intent, as hereinafter is more particularly alleged and charged.

That the said R. T. K. Bain, George M. Bain, Jr., and James G. Bain, who are brothers and partners of the late firm of Bain & Bro., are the identical individuals hereinbefore mentioned as being officers and directors of the Exchange National Bank of Norfolk, to wit, James G. Bain, vice president and director; R. T. K. Bain, a director, and Geo. M. Bain, Jr., the cashier of said bank.

From all which it appears, and the plaintiff avers and charges, that the said George M. Bain, Jr., cashier, as aforesaid, and the said R. T. K. Bain and James G. Bain, directors, as aforesaid, of the Ex-

change National Bank, and as partners composing the firm of Bain & Bro., wilfully, fraudulently, and unlawfully conspired together to obtain and did obtain of the monies of said bank as a loan to them without any security to the bank therefor, and did incur liabilities to the said bank largely exceeding in amount one-tenth of the capital stock of the said bank, and to a greater extent than is allowed by law, in violation of section 5200 of the Revised Statutes of the United States.

And the said George M. Bain, Jr., cashier of said bank, wilfully and fraudulently permitted the said loans to be made to his said firm in furtherance of the said conspiracy to defraud the said bank, and without requiring any security therefor, or taking, if any, security altogether inadequate for the said loans. From all which grossly negligent, reckless, and fraudulent mismanagement of the affairs of the said bank have resulted its present insolvency, suspension, and ruin.

The plaintiff further shows that knowledge of the insolvent condition of the said bank and of the acts of and doings of its officers and directors, contrary to law, equity, and good conscience, was obtained as follows: That on or about the 10th day of March,

7 1885, the period of the corporate existence of the Exchange National Bank being then about to expire, and the said bank desiring to continue its business and renew its corporate existence, made application therefor to the Comptroller of the United States; and thereupon, under the instructions of the said Comptroller, examination was had and made by a bank examiner, pursuant to law, into the affairs and condition of the said bank; and upon the said examination the existence of the vast indebtedness of the said firm of Bain & Bro. and of the individuals composing the said firm as aforesaid became and was apparent, and other facts showing the insufficiency of assets and reserve funds and the default and negligence of said bank officers, and the actual insolvency of said bank were then ascertained, and thereupon a period of thirty days was allowed and granted to the said bank by the Comptroller of the Currency within which to increase its solvent assets and securities and to bring its reserve fund up to the amount required by law.

Accordingly the said bank and its officers made efforts to comply with this requirement, and to that end the said Bain & Bro. were required to reduce their said liabilities to the said bank and to deposit securities with said bank for the same. In obedience to which demand the said Bain & Bro. on the 31st day of March, 1885, executed and delivered to the said bank the following paper writing in the words and figures following, to wit:

"Whereas the firm of Bain & Bro. is largely indebted to the Exchange National Bank of Norfolk, Virginia, and in order to reduce the said indebtedness is desirous of transferring certain securities unto the said bank, but is desirous also of guaranteeing to the said bank that the said securities shall realize whenever put upon the market the sum set opposite them respectively: Now, therefore, we do hereby covenant and agree to and with said bank, in consideration of said bank purchasing said securities at their par value, save

as hereinafter indicated, that the said securities hereinafter set forth shall realize whenever put upon the market the sums opposite them respectively, and we do covenant and agree to indemnify and save harmless the said bank from all loss, injury, damage, and harm which may result to said bank from said purchase, and guarantee any deficiency which may result from the sale of said securities.

"The following is a list of the securities purchased by said bank, viz:

Seaboard Compress Company stock	$300,000
Meherrin Valley railroad bonds	200,000
Southern Telegraph Company bonds of the par value of $140,000, taken by said bank at	70,000

"And we do hereby further transfer and assign unto the said the Exchange National Bank, its successors and assigns, all our right, title, and interest in and to the Richmond Cedar Works of Richmond, Virginia, and all our right, title, and interest in and to the sum of eight thousand dollars of Southern Telegraph Company bonds, held by us as collateral security, to be held by said bank as and for a further security for this guarantee and for all other debt and demands due from us to said bank."

"Witness our had this 31st day of March, 1885.

(Signed) "BAIN & BRO.
"R. T. K. BAIN."

8 That in pursuance of the paper writing above recited the said Bain & Bro. delivered to the said bank three hundred thousand dollars, face value, of the Seaboard Compress Company stock, $140,000 face value of bonds of the Southern Telegraph Company, and $200,000 face value of the bonds of the Meherrin Valley Railroad Company, and guaranteed the value of the said stock and bonds, as mentioned in the said writing; but the plaintiff avers that the said Bain & Bro., individually and as a firm, well knew that the actual value of the said securities and each of them, with the probable exception of the Seaboard Compress Company, was not near fifty per cent. of their face value, and well knew the condition of each of the said corporations whose stock and bonds they had thus pledged, and that the said corporations, with the exception aforesaid, were actually insolvent.

Nevertheless the plaintiff charges that upon the delivery to the said bank of the writing aforesaid on the 31st day of March, 1885, the said Bain & Bro. were wrongfully and unlawfully permitted by the said George M. Bain, Jr., cashier, to withdraw from the said bank twelve of the notes of the said Bain & Bro. which they had discounted at said bank, each for the sum of twenty-five thousand dollars ($25,000), amounting together to the sum of three hundred thousand dollars ($300,000), and the same were delivered up to the said Bain & Bro. by the said cashier, and by him marked off from the books of said bank as cancelled and fully paid.

VII. That, in addition to the indebtedness and liabilities of the said Bain & Bro. to the said bank as aforesaid, the said firm of Bain

& Bro. were stockholders of said bank to the extent of fourteen hundred and ten shares thereof, and were and are liable to be assessed to the full par value thereof for the payment of all contracts and debts of said bank, according to the provisions of section 5151 of the Revised Statutes of the United States, and that since the suspension of the said bank the said firm of Bain & Bro. has been notified and required under the order of the Comptroller of the Currency of the the United States to pay the full amount of their liability as stockholders as aforesaid, to wit, the sum of one hundred and forty-one thousand dollars ($141,000), and have not paid the same; and the plaintiff charges that the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain, as individuals and partners composing the firm of Bain & Bro., and being also the cashier and directors respectively of the Exchange National Bank of Norfolk, wrongfully, unlawfully, and fraudulently conspired together to execute a fraudulent deed of trust to John T. Griffin, John B. Jenkins, and Wm. W. Old, with intent thereby to delay, hinder, and defraud the said The Exchange National Bank of Norfolk of and from the recovery of the large sums of money due by them and each of them to the said bank, and which the said bank was lawfully entitled to have and recover of and from them and each of them, and with intent to delay, hinder, and defraud the said bank and the plaintiff as receiver thereof, and from the recovery of the said debt and liability thereto as stockholders thereof, and in fraud of sections 5151 and 5234 of the Revised Statutes of the United States in such case made and provided.

9 And in pursuance of the said conspiracy the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain, composing the firm of Bain & Bro., and having in possession considerable property, both social assets and individual estate, consisting of monies, negotiable securities, notes, bills, bonds, and other evidences of debt, and being seized of considerable real estate in the names and occupancy respectively of R. T. K. Bain, George M. Bain, Jr., and James G. Bain, which real estate the plaintiff charges was purchased chiefly with the moneys which the said firm had so wrongfully and fraudulently obtained from time to time from the said Exchange National Bank, did on the 6th day of April, 1885, with intent to hinder, delay, and defraud the said Exchange National Bank, execute and acknowledge a deed of trust bearing date the 6th day of April, 1885, and caused the said deed to be recorded in the clerk's office of the hustings court for the city of Portsmouth, and in the clerk's office of the county court of Norfolk county, and elsewhere in said district, purporting to assign, transfer, and convey unto the said John T. Griffin, Wm. W. Old and John B. Jenkins, trustees, chosen for the purposes and trusts specified therein, "All the assets and property of every kind whatsoever, real, personal, and mixed, both of said late copartnership of Bain & Bro., composed as aforesaid of the said Robert T. K. Bain, George M. Bain, Jr., James G. Bain, and Thomas A. Bain, deceased, and of the present copartnership of Bain & Bro., composed of the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain," with further general de-

scription of the same and recital of intention "to convey all the property of every kind whatsoever, real, personal, and mixed, wherever situated or found of the late firm of Bain & Bro., of the present firm of Bain & Bro., and of the individual members of the present firm of Bain & Bro." "In trust," for the uses and purposes therein expressed and hereinafter mentioned.

An authenticated copy of the said deed of trust is herewith filed, marked Exhibit A, and prayed to be taken as a part of this bill.

The plaintiff charges that the said George M. Bain, Jr., Robert T. K. Bain, and James G. Bain were, individually and as the firm of Bain & Bro., insolvent at the time of the making of the said deed, and owed debts and liabilities largely in excess of their assets, and were and are unable to pay the same, and have now no property, real or personal, against which the plaintiff can proceed at law to enforce payment and satisfaction of the debts due by them to the said bank; but, as above charged, the said George, M. Bain, Jr., R. T. K. Bain, and James G. Bain, on the one side, and the said John T. Griffin, John B. Jenkins, and Wm. W. Old on the other, well knowing the premises aforesaid, and with the intent and in pursuance of the said unlawful and inequitable conspiracy and design, entered into the said alleged conveyance of all their said assets and property with intent to delay, hinder, and defraud the said bank of and from the debts due to it by them as aforesaid, and to prevent the said bank and the plaintiff as receiver thereof from the recovery of said debts so due by them as aforesaid.

And the plaintiff further charges that the said deed is fraudulent and void, because the said conveyance and assignment to the said alleged trustees is voluntary and not upon consideration deemed valuable in law; and because there is no sufficient designation therein of the property thereby intended to be conveyed.

10 And as a part of the inequitable and fraudulent scheme of the said Bain & Bro., the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain, well knowing their insolvent condition and the insolvency of the Exchange National Bank, and having executed and delivered the written agreement and guarantee aforesaid, bearing date the 31st day of March, 1885, to the said bank immediately thereafter, to wit, on the 2d day of April, 1885, closed the doors of their banking-house at the city of Portsmouth, and forthwith proceeded to carry out their fraudulent intent in pursuance whereof they made the said deed of trust of the 6th day of April, 1885, whereby and in violation of good faith and in utter disregard of their said promise and guaranty in the said writing of the 31st day of March, 1885, they voluntarily, wilfully, and fraudulently deprived themselves of all means of responsibility to make good, save, and indemnify the said bank against loss and damage on account of the worthlessness of the securities thereby pledged and guaranteed to the said bank for their immense indebtedness thereto. And the plaintiff avers and charges that the said John T. Griffin, John B. Jenkins, and Wm. W. Old, the trustees in the said alleged deed, had notice of the suspension of the said banking firm of Bain & Bro. at the time of the making of the said deed, and of

its insolvency and indebtedness to the Exchange National Bank, and of their official relations as directors of said bank, and of the intent of the said Bain & Bro. to hinder, delay, and defraud the said Exchange National Bank of Norfolk of and and from recovering the said indebtedness to it, the said Wm. W. Old being at the said date, and for a long time prior thereto, the attorney, counsel, and legal adviser of the said firm of Bain & Bro., and having full knowledge of its assets and liabilities, and then and there present daily from the 2d day of April, 1885, to the 6th day of April, 1885, aiding, advising, and preparing the said deed of trust, and finally consummating the said grantor's intent by drawing, executing, acknowledging, and recording the said alleged deed.

VIII. The plaintiff further charges that the said deed is on its face fraudulent, null and void, and should be so declared and decreed, for the following, among other reasons: The said deed provides that the trustees may make sale of the real and personal estate thereby conveyed at public auction or private sale; "and they may make such sale upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the 2d class above enumerated shall have the right to purchase any part or parcel of said property so sold, and pay the said trustees therefor at its full face value the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase-money. This provision renders the said deed on its face invalid, uncertain, inequitable, fraudulent, and void, for the reason that no certain interest is vested by the deed in any creditor of the said grantors, and the preference given to the creditors named in the first-class, who are excluded from the privilege of bidding on an equal footing with those named in the second class of creditors is illusory, vain, and fraudulent.

And further, that even to those creditors of the second class the trustees are vested with discretionary powers the exercise of
11 which would be unjust and inequitable, and as between those creditors of the second class who may purchase and pay for property under the said deeds with the sums of money found due them, respectively, and those who do not so purchase, the said trustees are made the judges of whatsoever rule of equality they may please to observe.

Such provision is therefore deceptive, illusory, fraudulent, and void, having for its object to array the said creditors against each other to bid for the favors of their debtors, the said grantors in the deed of trust aforesaid.

The plaintiff here says that as receiver of the said bank he is apparently placed in both the first and scond class of preferred creditors in said deed, but so deceptive and illusory are the provisions of said deed with respect to the said debts due to said bank that the plaintiff is deprived of any interest therein; and the said deed, though purporting to secure the said bank among the first class of preferred debts, fraudulently and deceitfully enables the trustees

therein to defeat the said preference by offering at public auction the real and personal estate of the said grantors to certain favored bidders and excludes all others from fair and equal competition with them in bidding on the said property; all which the plaintiff says that the said grantors, their aiders and advisers in executing the said fraudulent deed, have attempted to accomplish for the purpose of obtaining fictitious values for their said property by inducing and compelling the said creditors of the second class, among whom are all the depositors of the firm, and whose deposits exceed the total value of the trust subject of Bain and Bro., to bid at auction for the same and pay therefor the amounts of their deposits at the said banking-house, or otherwise suffer the loss of the same; that such provision is inequitable, unjust, and unlawful, because "it converts the debtor into a dispenser of alms to his own creditor and puts up his favor and bounty at auction under the cover of a trust to be bestowed upon the highest bidder." And the said deed is on its face fraudulent and void for the further reason that the said trustees are therein empowered with absolute authority to sell the property mentioned whensoever and wheresoever they may deem proper and upon such terms as to credit, unlimited or otherwise, as they may deem best. Such provision defeats the right of creditors to have the said property speedily converted into money for payment of their debts, and hinders, delays, and defrauds the plaintiff in the collection of his said claims and demands.

And the said deed is on its face fraudulent and void for the further reason that the said trustees are empowered therein to carry on "the cultivation of crops now growing or which may be planted on any of the lands hereby conveyed for the present year, and, in case any of the said country lands shall remain unsold during the present year, to make such arrangements or contracts for their cultivation until sold as shall seem best, the charges, costs, and expenses of all which shall be charged as part of the expenses of this trust."

Such provision seeks to authorize the trustees to subject the trust fund to the expenses and hazards of farming operations to be conducted by them on "the country lands" of the grantors, whereof the estate largely consists, and hinders, delays, and defrauds the
12 plaintiff for long periods of time in the collection of the debts due to said bank.

And the said deed is also fraudulent and void on its face for the further reason that the trustees are therein authorized to employ all such "attorneys" as may be necessary "for the protection of the property hereby conveyed," and the charges, costs, and expenses "shall be charged as a part of the expenses of this trust." This power [is] not limited in any manner by the said deed, and the plaintiff says that such provision tends directly to the impairment of the trust fund and to the injury of the creditors, and hinders, delays and defrauds the plaintiff of the recovery of his just demands.

IX. The plaintiff further shows that the said John T. Griffin, John B. Jenkins, and Wm. W. Old, the persons named in the said deed as trustees, have taken possession of all the assets and property, real, personal, and mixed, social and individual, of the said George

M. Bain, Jr., R. T. K. Bain, and James G. Bain, late bankers and brokers, doing business under the firm name of Bain & Bro., save and except the dwelling-houses of the said parties respectively in city of Portsmouth, and the personal property therein, and save and except also that the said R. R. K. Bain is, as the plaintiff is informed and believes, in charge of the books, accounts, and papers of the said late firm at their place of business in Portsmouth, Virginia, and is in daily attendance at and apparently in charge of the said banking-house or place of business. And the said trustees, though required to prepare an inventory of all the said property, as mentioned in said deed, have not as yet done so nor made known to the plaintiff or other creditors what is the character, amount, or value of the assets of Bain & Bro. whereof they have so taken possession; but the said trustees are proceeding to collect the assets of the said grantors in pursuance of the terms of the said fraudulent deed; and, in furtherance of the said fraudulent intent wherewith the same was made, are proceeding to misapply and misappropriate the moneys so collected by them to the debts and demands of the creditors of the said grantor, as mentioned in the said deed. And the plaintiff says that the said deed, being fraudulent and void, the plaintiff is entitled to have the same so declared and is thereupon entitled to have his claims and demands as aforesaid paid and fully satisfied in preference to any and all claims of creditors whose debts are mentioned and attempted to be secured in the said fraudulent deed, and if the said John T. Griffin, John B. Jenkins, and Wm. W. Old, as such trustees under said deed, are allowed to collect the said assets so fraudulently conveyed to them and apply the proceeds thereof in accordance with the said fraudulent intent of said deed, as is their purpose and design, to the debts so fraudulently preferred therein, in preference to the claims of the plaintiff for the debts due the Exchange National Bank of Norfolk, and for which the plaintiff claims a lien from the date of the filing of this bill, over and above all other claims or liens attempted to be created by said fraudulent deed, then there will remain nothing of the assets and property of the said grantors out of which the plaintiff can have payment of the said debts due the said bank, and he will inevitably suffer great and irreparable damage, loss, and injury unless this honorable court will intervene for the protection and relief of the plaintiff.

Forasmuch, therefore, as these doings are contrary to equity
13 and good conscience, and as the plaintiff is remediless save in a court of chancery, where matters of this sort are alone and properly cognizable, the plaintiff, as receiver of the Exchange National Bank of Norfolk, prays that the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, as partners of the late firm of Bain & Bro., the said R. T. K. Bain and Fanny Bain, his wife; George M. Bain, Jr., and Willie F. C. Bain, his wife; and James G. Bain and Emily Bain, his wife; and John T. Griffin, John B. Jenkins, and Wm. W. Old, as trustees under the deed of trust from the said Bains, dated the 6th day of April, 1885; Annie S. Hall, Wright B. Carney, Joseph T. Duke, W. R. Old, Charles E. Jenkins, Wm. M. Jones, Patrick H. Lee, and Isaac P. Lee, partners

trading under the name and style of Jones, Lee & Co.; John T. King and Geo. W. King, partners trading as John T. King & Bro.; Geo. T. Wallace and John G. Wallace, partners trading as Wallace & Son; George Tait, Alexander & Powell, John B. Riddick and Nestor F. Richardson, partners trading as Riddick & Richardson; the employees of Bain & Bro., and of George T. Wallace, and of Wallace & Son, whose names are to the plaintiff unknown, and all the depositors of the said Bain & Bro. at their banking-house in the city of Portsmouth, and all other creditors referred to in the said deed of trust of April 6th, 1885, whose names are to the plaintiff unknown, may be made parties defendant to this bill; may be severally required to make answer thereto as fully and particularly as if each of them had been specially interrogated, but the plaintiff waives answers under oath to this bill; and that they may be required to make full answer on oath to the interrogatories appended to this bill; that a decree may be made setting aside and declaring null and void the said illegal and fraudulent deed of trust dated the 6th day of April, 1885, to the said alleged trustees, John T. Griffin, John B. Jenkins, and Wm. W. Old, and avoiding the charge thereby attempted to be created upon the estate of the said firm of Bain & Bro., and of each individual member thereof; that proper decrees of reference may be had and accounts ordered of the assets and liabilities of the parties last above mentioned, and of the debts and demands due by them and each of them, especially to the said Exchange National Bank, as well as of any demands or debts due to it by them at the time of the making of the said deed as of any matured or maturing since that date; that the property mentioned and attempted to be conveyed in the said deed may be declared subject to a lien in favor of the plaintiff for the debts due by the said firm of Bain & Bro., George M. Bain, Jr., R. T. K. Bain, and James G. Bain to the said Exchange National Bank of Norfolk, in preference to the claims of all other creditors of said parties; that, pending such proceedings and to prevent the immediate and irreparable damage threatened to the plaintiff, your honors will issue an injunction restraining the said defendants, John T. Griffin, John J. Jenkins, and Wm. W. Old, alleged trustees as aforesaid, each and all of them, and all others, their agents, attorneys, servants, or employees, from further interference with the assets and affairs of the said Bain & Bro., George M. Bain, Jr., Robert T. K. Bain, and James G. Bain, or either of them, and from further proceeding to collect or disburse any of their said assets or property, and from any control over the same until the further order of the court; that custody be
14 taken by the court of the said property, and to that end your honors will appoint a receiver to take charge of all the assets and property mentioned in the said deed of trust of April 6th, 1885, and of any property, moneys, funds, evidences of debt, or other assets mentioned in said deed which may have come or be in the possession of the said John T. Griffin, John B. Jenkins, Wm. W. Old, trustees, or of either of them, under and by virtue of the alleged deed; and that such receiver may take into his possession and safely keep all the books and papers of the said late firm of Bain & Bro.,

and of the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain; and that until the time for granting such injunction and appointing such receiver your honors will grant a temporary restraining order for the purposes aforesaid, as is usual and proper when, as in this cause, the danger of irreparable damage is alleged and apparent; that the plaintiff may be allowed to amend this bill as occasion may require; that proper process and publication as to the unknown defendants may be had and made, and that this cause may proceed without them on such terms as the court may direct; that a personal decree may be made against the said defendants who have fraudulently intended to hinder, delay, and defraud the said Exchange National Bank as aforesaid; that the plaintiff may have his said claim fully paid and satisfied, and that he may have such other, further, and general relief as to equity may seem meet and the nature of his case may entitle him to receive.

May it please this honorable court to grant a writ of subpœna, &c., as prayed above; and the plaintiff, as in duty bound, will ever pray, &c.

WM. H. PETERS,
Receiver of the Exchange National Bank of Norfolk,
By T. S. GARNETT, JR.,
His Counsel.
EDWARD WADDILL, JR,
U. S. Attorney, Eastern District of Virginia, Attorney.

STATE OF VIRGINIA, }
Corporation of the City of Norfolk, } *To wit:*

On this 2nd day of May, 1885, before me personally appeared Wm. H. Peters, who upon oath says that the statements in the foregoing bill are true so far as the same are therein known to him of his own personal knowledge, and that those statements contained therein upon information and belief he believes to be true, to the best of his knowledge and belief.

WM. H. PETERS, *Receiver.*

Subscribed and sworn to before me this 2d day of May, A. D. 1885. Witness my hand and notarial seal.

WM. H. WHITE,
Notary Public.

Presented May 2d, 1885.

This bill was exhibited to me on the 2d day of May, 1885, at Norfolk, Va., and order prayed for.

R. W. HUGHES, *Judge.*

15 Interrogatories to be propounded to and answered by R. T. K. Bain, George M. Bain, Jr., and James G. Bain individually and as partners of the late firm of Bain and Brother, defendants in the foregoing bill.

First. What was the total amount of your and each of your debts and liabilities to the Exchange National Bank of Norfolk on the 6th

day of April, 1885, either as individuals or as partners of the firm of Bain & Bro., and either as makers, endorsers, sureties, or guarantors, or otherwise? What was the consideration of all such indebtedness and how the same is evidenced?

Second. What was the amount and character of the assets of the firm of Bain & Bro., and of each of you individually, on the 6th day of April, 1885? And give a full inventory and description thereof.

Third. State in detail how the moneys for which you, and each of you individually and as the firm of Bain & Bro., are indebted to the Exchange National Bank of Norfolk were expended by you, and each of you individually and as partners of said firm. State severally your answers to this interrogatory.

Fourth. State the amount, character, and value of all the real and personal estate of each of you individually whereof you and each of you were seized and possessed on the 6th day of April, 1885, and declare in detail the situation, condition, and value of such property.

Fifth. State what part, if any, of the real estate held by either of you, or standing in the name of either of you, on the 6th day of April, 1885, actually belonged to the firm of Bain & Bro., and whence did you or either of you derive the moneys with which such property was purchased, and state severally which one of you so held any such property.

Sixth. Were you and each of you officially connected with the Exchange National Bank of Norfolk on the 2d day of April, 1885? State how and in what position, either as officer or director, of said bank and for what period of time you had held such office prior to that date.

Seventh. Were you and each of you, either as individuals or as the firm of Bain & Bro., stockholders of the Exchange National Bank of Norfolk on the 2d day of April, 1885? If yea, state the number of shares of Bain & Bro. and the number of shares thereof held by each one of you individually.

Eighth. State whether or not the consideration of one hundred and fifty-one thousand eight hundred ($151,800) dollars named in the deed of George T. Wallace and John G. Wallace, dated the 4th day of April, 1885, copy whereof is filed as Exhibit No. 1 with the plaintiff's bill, was paid by you in cash money, and, if not in cash money, then state of what the consideration for said deed consisted and how the same was paid.

And on the same day the court entered an order in the said cause, which is in the words and figures following, to wit:

16 Wm. H. Peters, Receiver of the Exchange National Bank, Plaintiff,
vs.
R. T. K. Bain, George M. Bain, Jr., James G. Bain, Late Partners Doing Business under the Name and Style of Bain & Bro.; John T. Griffin, John B. Jenkins, and William W. Old, Trustees, &c., Defendants. } In Chancery.

This day came the plaintiff, and by leave of the court filed his bill, which alleges that irreparable injury will result to him unless this court shall award a temporary restraining order prohibiting the defendants specially named in the bill from further interference with the assets and affairs of the late firm of Bain & Bro., George M. Bain, Jr., Robert T. K. Bain, and James G. Bain, or either of them; which order the plaintiff thereupon moved the court to grant. On consideration whereof, and for good cause shown, a temporary restraining order is awarded the plaintiff to enjoin and restrain the defendants, John T. Griffin, John B. Jenkins, and William W. Old, from further proceeding to act as trustees under the deed of trust bearing date the 6th *date* of April, 1885, in the plaintiff's bill mentioned, and to enjoin and restrain the said defendants, their agents, attorneys, servants, and employees, and all others, from any further interference with the assets and affairs of the late firm of Bain & Bro., George M. Bain, Jr., R. T. K. Bain, and James G. Bain, or of either of them, and from further proceeding to collect or disburse any of their said assets or property in the said deed mentioned, and from having any control over the same, so as to hold, preserve, and safely keep the same until the further order of the court in this cause. And the motions for a preliminary injunction and the appointment of a receiver are set down for hearing at the United States court-rooms at Norfolk on the 12th day of May, 1885, and the plaintiff shall, with all convenient speed, give notice of such motions by serving a copy of the bill in this cause upon each of the said defendants with a copy of this order thereto annexed. But the plaintiff is not to have the benefit of this order until he, or some one for him, shall enter into bond before the clerk of this court or his deputy in the penalty of $10,000, with approved security, conditioned to pay all costs and damages which may be awarded against him in case said injunction should be dissolved.

Norfolk, Va., May 2d, 1885.

R. W. HUGHES, *Judge.*

A true copy.
Teste:

—— ——,
Deputy Clerk Circuit Court,
By —— ——,
Deputy Clerk.

17 EXHIBIT No. 1.

This deed, made this the fourth day of April, in the year eighteen hundred and eighty-five, between George T. Wallace and Julia M., his wife, and John G. Wallace and Veronica M., his wife, and the said George T. Wallace and John G. Wallace, partners doing business as Wallace & Son, of the county of Norfolk, State of Virginia, parties of the first part, and Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, partners doing business under the name and style of Bain & Bro., parties of the second part, witnesseth: That for and in consideration of the sum of one hundred and fifty-one thousand and eight hundred dollars they, the said George T. Wallace and Julia M., his wife, and John G. Wallace and Veronica M., his wife, do grant with general warranty unto the said parties of the second part the following property, to wit: All the following real estate in the county of Norfolk, consisting of the Dover tract, containing 2,500 acres, more or less, with all the buildings and improvements thereon, including the shook factory thereon, and all the machinery therein, except the hackling machine therein, the property of C. R. Van de Carr, and excepting about 16 acres thereof adjoining the mill at Wallacetown, which has been deeded to the Richmond Cedar Works, the said tract being bounded on the north by the N. West river, east by the Dismal Swamp canal, south by the feeder, and west by the Douglass swamp; all that part of the Glencoe farm, known as Lower Glencoe or Miles Foreman tract, bounded on the north by the North W. river, east by lands formerly Michael Sykes', south by land formerly Michael Sykes', and west by the Franklin Lynch or Douglass tract; and also the Wild Horse Ridge tract. The Ballyhack lands, composed of the part of the Newton and Kelly tract, set apart to the said George T. Wallace, in the division between him and Geo. D. Happer, and containing about 1,500 acres, and that part of the Angle tract lying east of the Newton & Kelly tract, this whole body of land containing about 3,000 acres, and bounded as follows: East by that part of the Newton and Kelly tract set apart to Geo. D. Happer, south by the North Carolina and Virginia State line, and west by the Dismal Swamp canal and the farm of E. R. Jackson, north by lands formerly M. Sykes', Dr. H. S. Etheredge's, the O. M. Lynch tract, E. R. Jackson's, the main road, and John J. Warren's land; one other tract on Ballyhack, bought of B. F. Vaughan and wife, containing — acres, bounded on the north by the Ballyhack road, east by E. R. Jackson's farm, south by the Angle tract, and west by Dr. H. S. Etheridge. The Wilkins farm, bought of John W. Wilkins and others; 70 acres bought of D. S. Evans; one undivided half interest in the tract known as the Hall tract; a lot in Brambleton, at the intersection of Highland avenue and Charles street, bought of the Norfolk and Brambleton R. R Co. and J. F. B. Marshall; all the lots owned by the parties of the first part in the village of Berkley, bought of E. M. Tilley, F. W. Sewell, Bernard Lapetia, and E. T. Powell, and all other property in the said village of Berkley owned by said parties of the first part or either of them; all the lots owned by the said parties of the first part or either of

them near the city of Portsmouth, and all in the city of Portsmouth, bought of S. M. Wilson, trustee, and L. R. Watts, J. H. Gayle, and J. F. Crocker, special commissioners. But all of the above lands are to be charged with the payment of a lien of six thousand dollars in favor of Thomas M. Wilson under a deed from George T. Wallace and wife to Charles Sharp, trustee, dated March 29th, 1876, to the exoneration of so much of Glencoe as has been conveyed by deed of even date herewith from George T. Wallace to John T. Wallace for the benefit of Mrs. Julia M. Wallace; also all the personal property of every kind and character whatsoever of the said George T. Wallace and John G. Wallace, either as individuals or as partners, doing business as Wallace & Son, wherever the same may be, except the furniture in the residence of the said George T. Wallace at Glencoe, and the household and kitchen furniture of the said John G. Wallace in his residence, and what is allowed said parties under the poor laws of Virginia, the said personal property consisting of all the mules, horses, oxen, cattle, wagons, carts, machines, and farming implements, tools, and appliances of all kinds now on the Glencoe and Dover farm, or elsewhere; all the corn, hay, fodder, and produce of every kind wherever found; all the merchandise in the
18 store at Wallaceton; the schooner Annie Wallace, her tackle and furniture, and one lighter covered for corn; all the lumber at the mill in Wallaceton; all the pine boards and scantling, dressed flooring, laths, cross-arms, cedar and cypress shingles, cedar boards and tank plank, juniper mill logs, pine mill logs, hewn timber and lighter sides, cyress and juniper piles, split rails, sawed rails, round rail poles, telegraph poles, fence posts, juniper cooper logs, and logs for manufacturing telegraph cross-arms; and the following kinds of lumber at the Cross canal, on the D. S. canal, in Camden county, North Carolina, viz: Telegraph poles, rail poles, fence posts, and logs used in manufacturing cross-arms, and also whatever there may be of the kinds of lumber named above now cut and remaining in the swamp up the Cross canal; all the pine mill logs in the water, on the shore, and cut in the woods, on the land of H. H. Page, on the Scuppernong river, in the counties of Tyrrell and Washington, North Carolina; the lumber now on the two lighters now at Gilmerton Locks, in Norfolk county, and the rails, rail posts, and telegraph poles on the landings at Gilmerton; also — shares of the Norfolk and Ouray mining stock, and ten shares of the Portsmouth and Deep Creek Turnpike Company.

Witness the following signatures and seals.

GEORGE T. WALLACE. [SEAL.]
JULIA M. WALLACE. [SEAL.]
JOHN G. WALLACE. [SEAL.]
VERONICA M. WALLACE. [SEAL.]

The words on page 1, line 29, "and also Wild Horse Ridge tract," and page 3, line 2, "from Geo. T. Wallace," were interlined before signing and executing this deed.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA, *County of Norfolk,* } *To wit:*

I, Norman Cassell, a notary public for the county of Norfolk, in the State of Virginia, do certify that George T. Wallace and John G. Wallace, whose names are signed to the writing above, bearing date on the fourth day of April, 1885, have acknowledged the same before me in my county aforesaid, and I do further certify that Julia M. Wallace, the wife of George T. Wallace, and Veronica M. Wallace, the wife of John G. Wallace, whose names are signed to the writing above, bearing date on the fourth day [of] April, 1885, personally appeared before me in the county aforesaid, and being examined by me privily and apart from their respective husbands, and having the writing above fully explained to them, they, the said Julia M. Wallace and Veronica M. Wallace, acknowledged the said writing to be their act and deed, and declared that they had willingly executed the same and do not wish to retract it.

Given under my hand this 6th day of April, 1885.

NORMAN CASSELL,
Notary Public.

VIRGINIA:

In the clerk's office of Norfolk county court, April 7th, 1885. This deed was presented in office, with the certificate annexed, and admitted to record.

Teste: ALVAH H. MARTIN, *C. C.*,
By WM. H. BARNES, *D. C.*

VIRGINIA:

In the clerk's office of the court of Hustings for the city of Portsmouth, April 14th, 1885. This deed was presented in said office, with the certificates annexed, and admitted of record.

Teste: C. T. PHILLIPS, *C. C.*,
By A. W. HARVEY, *D. C.*

A copy.
Teste: C. T. PHILLIPS, *C. C.*,
By A. W. HARVEY, *D. C.*

19 EXHIBIT No. 2.

This deed, made this 3rd day of April, 1885, between George T. Wallace and Julia M., his wife, John G. Wallace, and Veronica M., his wife, of the one part, and the Richmond Cedar Works (Limited) of the other part, witnesseth: That for and in consideration of the sum of fifty-five thousand dollars, of which the sum of thirty-one thousand eight hundred and eighty-five seventy one-hundredths dollars has been paid in cash, the receipt whereof is hereby acknowledged and the residue whereof is to be paid in four equal installments, one of $5,778.57, to be paid in two years from this date; the next for like amount, to be paid in three years from date; another for $5,778.58, to be paid in four years from this date; the last of like amount, to be paid five years from this date; each of said deferred installments to bear interest from this date, and evidenced by the note of the Rich-

mond Cedar Works (Limited), this day executed and delivered to said parties of the first part, they, the said Geo. T. Wallace and Julia M., his wife, John G. Wallace and Veronica M., his wife, do hereby grant, convey, assign, release, and set over unto the said Richmond Cedar Works (Limited) the following real, personal, and mixed properties, to wit: A tract of swamp land called "Endless Bay," situated in Dare county, North Carolina, on Alligator river, containing about five thousand acres, purchased of Tho. B. & Geo. W. Rowland, together with all interests in swamp lands adjoining the above by patent or purchase from W. H. Basnight and others, and all other lands or timber rights or interest owned by said grantors or either of them lying in said Dare county, N. C.; also all the swamp lands and timber or lumber interest owned by said grantors or either of them situated in Tyrrell county, North Carolina, including the swamp lands contiguous or near to Frying Pan creek, and known as "Frying Pan" swamps, containing about five thousand acres, purchased of Lemuel Basnight, ex'r, the said Lemuel Basnight and wife, Martha M. Basnight, Jesse L. & W. H. H. Cooper, Thos. White, Sally Sample, W. P. Brickhouse, Ira B. Cahoon, Jno. Sykes, W. J. Sawyer, Jno. A. Sawyer, Ann Patrick, and others; also all the swamp lands on Scuppernong river, in said county, purchased from Wm. M. Owens and other persons, containing about 400 acres; also all the swamp lands, timber, and lumber interests of said grantors or either of them situated in Washington county, North Carolina, including the swamp lands situated on Bull's Bay and Albemarle Sound, containing about five thousand acres, purchased of A. D. Owens, T. L. Jones, —— Hupton, and others. One other tract called Frog Misery, containing about six hundred acres, purchased from Charles Latham, commissioner; also the timber on the lands of H. H. Page and T. J. Basnight and Arthur Collins, to be cut and removed within a term of years as per contract; also the swamp lands purchased of J. W. Hassell and others, containing about 200 acres; also all the swamp lands, timber, and lumber interests of said grantors or either of them situated in Perquimans county, North Carolina, including the swamp lands known as the Little John patent, bought of Wm. Willey and others, containing about one thousand acres; and the swamp lands bought of F. E. Winslow, known as the Collins' patent, containing about 2,000 acres; and the Stalling's patent, bought of Dr. Perry, containing about 600 acres; also all their swamp lands, timber, and lumber interests in Pasquotank county, N. C., including the swamp lands known as the John and James Taylor tract and bought of John R. White, containing about 1,000 acres; also all the swamp lands, timber, and lumber interests of said grantors, or either of them, situated in Gates county, N. C., including the swamp lands, known as the Pierce patent, bought of Joseph Briggs and others, containing about 200 acres; the Mary Riddick patent of about 640 acres; bought of W. B. S. Riddick, A. F. Harrell, Jas. E. and J. B. Riddick, about 176 acres; bought of J. T. Barnes, about 150 acres; bought of Nancy, Charles, and Mathew Jones, about 150 acres; bought of T. H. Lassiter and wife, about 300 acres; bought of Jno. J. Spratt and Mrs. Martha Brothers, the Coston tract, containing about 300 acres, bought of

Coston Jordan, adm'r of Geo. Coston, dec'd, are situated on the western edge of the Dismal Swamp and south of Cross canal. All that body of swamp land in said county, on the western edge of Dismal Swamp, north of the Cross canal, containing about 500 acers, bought of B. F. Willey, R. E. Parker, Dan'l Wilkins, and others, J. W. Hill, Calvin Brinkley, Amanda Parker, W. H. Vaun, and all other lands owned by said grantors, or either of them, in that vicinity; also the swamp lands on the Cross canal, known as the Allyn tract, and containing about 1,300 acres, bought of Jos. T. Allyn and Dr. Thos. C. Hines; also the swamp land called the Morris tract, containing about 800 acres, on or near the "Cold Water Ditch," bought of Jethrow Riddick; a track of swamp lands on the Chowan river, between Catharine and Bennett's creeks, called the Baker tract, containing about 1,000 acres; a tract of swamp land on Bennett's creek, bought of John and Jacob Morris, containing about 2,000 acres, and other swamp lands in said county; also all the swamp lands, timber, and lumber interests owned by the grantors, or either of them, in Camden county, N. C., including that body of swamp lands on the north and south sides of Cross canal, between the line of John L. Roper, Lumber Co., near the mouth of Southwest ditch, and the crooked ditch, known as the Cross canal swamps, containing about 6,000 acres, bought of Gisborne Cherry, Wm. Wallace, John R. White, A. P. Cherry, W. R. Old, C. W. Wickings, and others; the swamp on the east side of the Dismal Swamp canal, between the Virginia and North Carolina line, and the Tadmore road, bought of R. T. Riddick, Leroy Powell, and others, and the tract adjoining and bounding the Currituck and Camden county line, bought of Elliott Creekmore, and the swamp lands bought of James Ferebee and W. R. Abbott, and all other lands and interests in that vicinity, containing about 1,600 acres, together with the timber privilege to cut timber, &c., for a term of years under a contract with Dr. F. N. Mullen on the Tadmore tract, a tract of swamp lands on North river below Indian Town, known as the Garrett swamp, bought of A. H. Grandy, sheriff, &c., containing about 1,000 acres; also two tracts lying east of the Crooked ditch, of about 863 and 100 acres respectively; also all the swamp lands and timber or lumber interests owned by the grantors, or either of them, in Currituck county, N. C.; all the interests in timber or in the fee-simple of lands which accrued to us by purchase from A. H. Lindsay and John L. Roper by the deed dated July 13, 1877, to 600 acres, more or less, of swamp lands adjoining the Virginia line, Camden county line, and New Swamp bridge; also the following swamp lands in Nansemond county, Virginia, to wit: The Brown and Jones swamp on the western edge of Dismal Swamp, adjoining the land of the Dismal Swamp Land Co. on the east, containing about 800 acres, purchased of M. Benton and wife; an adjacent tract bought of Henry Brothers, containing about 400 acres, and adjoining tract containing 222 acres, bought of W. H. Riddick, and all other swamp lands or interest in swamp lands owned by the grantors, or either of them, in Nansemond county, Va.; also two tracts of swamp land in Norfolk county, Va., near the village of Deep Creek, called respectively the McIntyre, containing 1,260

acres, and two-thirds of the Cooke tract, containing about 2,000 acres, both bought of Joel Post; also one undivided moiety of the big entry patent in said county, containing in the gross about 3,000 acres, bought of John R. White, and others; also tract of swamp land called Butt's swamp, on the south side of the feeder from Lake Drummond, bounded by the North Carolina line, the lands of the Dismal Swamp Land Company, and the feeder and the angle tract bought of W. H. White, commissioner in Bloodgood *vs.* Foreman, containing about 2,000 acres, the timber on that part of the angle tract of swamp land lying west of the Dismal Swamp canal and south of the feeder, as reserved in the deed from George T. Wallace to E. D. Brown and H. H. Kimpton, to which, as recorded in clerk's office of Norfolk county, reference is hereby made; also the swamp lands in said Norfolk county, known as the Old River swamp, bounded on south by N. W. river, on east by Dismal Swamp canal, on the north by lands of H. E. Weston, and on the west by lands of H. E. Weston and W. F. Douglass, containing about 500 acres; the swamp lands in said county situated east of what is called the Happer tract, bounded on the south by the North Carolina line, on the north by the High Lands, containing 1,000 acres, purchased of McLin D. E. Ford, Mary E. Goodman, Wilson S. Wilkins, and others, and part of which is covered by patent to Nicholas & Wright Creekmore for 320 acres, and patent to J. G. Wallace for 300 acres. A tract of cypress swamp land in said county situated between the N. W. canal and the N. W. river, containing about 70 acres, it being so much of this tract purchased of J. F. Crocker, special commissioner, &c., as has not been conveyed to Mary Newbern; also all the rights of said grantors, or either of them,

21 in and to the Orapeake and Turnpike Company, as shown by deeds from numerous parties, and recorded in Gates county, N. C., and also the rights of said grantors, or either of them, to the use and possession of all ditches, tramways, and other easements and facilities for transportation to and from any and all the lands hereby conveyed, it being the purpose of this deed to vest in said grantees all the rights of said grantors, or either of them, appurtenant to said lands, both in North Carolina and Virginia. For the descriptions of properties hereby conveyed reference will be had to the records of the respective counties in North Carolina and Virginia, above named; also the following parcel of land at Wallacetown, in Norfolk county, Va., lying on the western side of the Dismal Swamp canal: Beginning at a point on western side of the log ditch, opposite a point about forty feet south of the northern end of the N. W. lock; thence about N. 76 W. along the center of the main street or avenue about 550 feet to a ditch; thence along and in a line with said ditch about N. 14 E. to the store or culvert ditch; thence along said ditch as it runs first eastwardly, then northwardly, and then eastwardly again till opposite the western side of the log ditch, thence along the west side of said log ditch to the beginning, the said parcel of land being that now used in connection with the saw-mill for its various purposes, or necessary therefor; also the saw-mill located at Wallaceton, on the west side of the Dismal Swamp canal, with all the buildings, sheds, railroads, or tramways, blacksmith shops, wheelwright shop,

ditches, and other appliances for handling and floating logs and lumber, and all the machinery, carts, and tools, and materials of every kind in said mill, sheds, and shops, &c.; also the buildings on the lands of the Dismal Swamp Canal Company at Wallaceton, occupied as a residence, &c., by J. G. Wallace, and as a store and outhouses; also one barge, called the Lizzie Wallace, one tug-boat, called the Nellie Prior, registered in Norfolk, four lighters, ten ditch lighters or skiffs, thirty-five lumber trucks, all the rafting gear used by the grantors in their wood and lumber business; also their tools used in said business; also twenty mules, four yokes of oxen, two log wagons, four carry-logs, two carts, and two lumber wagons. And the said George T. Wallace and John G. Wallace do hereby covenant that they will warrant specially the titles to the real estate conveyed by this deed. A lien is hereby expressly reserved on the real estate hereby conveyed to secure the payment of the deferred installments of purchase-money above specified; but this reservation shall not interfere with the cutting and removal of any timber or lumber on said real estate so long as there is no default in the payment of said installments.

N. B.—After this deed was written thus far the parties thereto agreed that the notes to be executed by the grantee for the deferred installments of the purchase-money should be as follows: For each installment there shall be twelve separate notes—eleven of $500 each and one for $278.57 or $278.58, as the case may be. This is done for the convenience of the grantors in using said notes.

Witness the following signatures and seals:

GEO. T. WALLACE. [SEAL.]
JNO. G. WALLACE. [SEAL.]
JULIA M. WALLACE. [SEAL.]
VERONICA M. WALLACE. [SEAL.]

STATE OF VIRGINIA, *County of Norfolk,* } *ss:*

I, Norman Cassell, a notary public for said State of Virginia and county of Norfolk, do certify that George T. Wallace and John G. Wallace, whose names are signed to the writing above, bearing date the 3d day of April, 1885, have each acknowledged the same before me in my said county. And I do further certify that Julia M. Wallace, wife of said George T. Wallace and Veronica M. Wallace, wife of said John G. Wallace, whose names are also signed to said writing, this day personally appeared before me, in my said county, and, being examined by me privily and apart from their said husbands, and said writing having been fully explained by me to each of them, they, the said Julia M. Wallace and Veronica M. Wallace, acknowledged the said writing to be the act and deed of each, and each declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 4th day of April, 1885.

NORMAN CASSELL,
Notary Public.

22 VIRGINIA:

In the clerk's office of Norfolk county court, April 7th, 1885. This deed was presented in office with the certificate annexed and admitted to record.

Teste: ALVAH H. MARTIN, *C. C.*,
By WM. H. BARNES, *D. C.*

A copy.
Teste: ALVAH H. MARTIN, *C. C.*

EXHIBIT A.

Trust.

ROBERT T. K. BAIN *et als.* to JOHN T. GRIFFIN *et als.*, Trustee.

This deed, made this the 6th day of April, in the year 1885, between Robt. T. K. Bain, George M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners, doing business under the name and style of Bain & Bro., and also constituting the existing copartnership of Bain & Bro., and the said Robert T. K. Bain and Fannie T., his wife; George M. Bain, Jr., and Willie F. C., his wife; and James G. Bain, and Emily, his wife, all of the city of Portsmouth, in the State of Virginia, parties of the first part, and John T. Griffin, Wm. W. Old, and John B. Jenkins, trustees, chosen for the purposes hereinafter named, parties of the second part, witnesseth:

That the said parties af the first part do grant unto the said parties of the second part all and singular the following property, to wit: All the assets and property of every kind whatsoever, real, personal, and mixed, both of the said late copartnership of Bain & Bro., composed, as aforesaid, of the said Robert T. K. Bain, George M. Bain, Jr., James G. Bain, and Thomas A. Bain, deceased, and of the present copartnership of Bain & Bro., composed of the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, including all the notes, bonds, bills, accounts, credits, stocks, moneys, office furniture, farming implements and utensils, horses, mules, wagons, carts, trucks, and all other personal property of every kind and description whatsoever, whether standing in the name of Bain & Bro. or of any or either of the said parties as individuals, and including all of the real estate, wherever situated, whether standing in the name of Bain & Bro. or of any of the partners, either of the old firm or of the present firm of Bain & Bro.; also all the real estate standing in the name of or belonging to the said Robt. T. K. Bain, either at law or in equity, situated in the city of Portsmouth, in the county of Norfolk, in the county of Nansemond, in the county of Southampton, in the county of Princess Anne, or wherever else situated, it being the object and intention to embrace and include all and every part of the real estate standing in the name of the said Robert T. K. Bain, or to which he is entitled at law or in equity, wherever situated; also the personal property of the said Robt. T. K. Bain of every kind, character, and description whatsoever, wherever found; also all the real estate standing in the name of or belonging to the said George M. Bain, Jr., either at law or in equity, whether situated in the city

of Portsmouth or the county of Norfolk, or elsewhere; and also all the personal property of the said George M. Bain, Jr., of every kind, character, and description whatsoever, wherever found; also all the real estate standing in the name of or belonging to the said James G. Bain, either at law or in equity, whether situated in the city of Portsmouth, or the county of Norfolk, or elsewhere; and also all the personal property of the said James G. Bain, of every kind, character, and description whatsoever, wherever found, it being the object and intention of this deed to convey all the property of every kind whatsoever, real, personal, and mixed,
23 wherever situated or found, of the late firm of Bain & Bro., of the present firm of Bain & Bro., and of the individual members of the said present firm of Bain & Bro., in trust, to secure the costs and expenses of this trust, including commissions, to the said trustees of five per centum upon the amount of sales or of the moneys which shall come to the hands of the said trustees from sales or otherwise, and the fees of counsel in and about the preparation and execution of this deed, if they shall remain unpaid at its delivery; and after the payment thereof to secure—first, three notes of George M. Bain, Jr., as maker alone, held by the Exchange National Bank, of Norfolk, Va., the overdraft of the said George M. Bain, Jr., at said bank, and the overdraft of Mrs. Annie S. Hall at said bank, and to the following depositors of Bain & Bro. the amounts of their several respective deposits, as follows: To Wright B. Carney, $157.82; to Joseph T. Duke, $122.69; to W. R. Old, $123.11; and to Charles E. Jenkins, $189.55, the said Bain & Bro. having held notes of the said depositors for amounts larger than the said several respective deposits, which said notes have been rediscounted, and one held by other parties, thereby preventing the said depositors from using their said deposits as offsets *pro rata* for said notes, and to Jones, Lee & Co. the sum of $5,000 and John T. King & Bro. the sum of $1,000 on account of their said several respective deposits, the said two last-named depositors having given their notes to the said Bain & Bro. for said amounts respectively, which said notes also have been rediscounted, thereby preventing said depositors from using so much of their said deposits as an offset thereto; also all the clerks and other employés of Bain & Bro., and all their servants and laborers, or the servants and laborers of either member of said firm, the amount or amounts due them respectively when this deed takes effect; also all the employees and laborers of George T. Wallace, or of Wallace & Son, the amount or amounts due them respectively when this deed takes effect; and after the payment of the hereinbefore mentioned sums and claims to secure, secondly, the following creditors to be paid equally and ratably if the property hereby conveyed shall be insufficient to pay them all, but with the privilege as to bidding on such property as may be sold at auction as hereinafter provided, viz: All the depositors of the said firm of Bain & Bro. at their banking-house in the city of Portsmouth for the amount and amounts due them as shown by the books of the said firm, and George Tait, Alexander & Powell, Riddick & Richardson, and Furman & Page the amount or amounts due them re-

spectively, either by Bain & Bro. or by either member of said firm; also any debt or liability contracted by Bain & Bro., or any member of said firm individually for groceries, dry goods, and other household supplies; also the notes of the Greenville Land and Lumber Company, aggregating $102,000, now held by the Exchange National Bank of Norfolk, Va.; and also to the Mapes Formula and Peruvian Guano Company the amount due it on account of guano sold and unaccounted for by R. T. K. Bain, agent. And after the payment in full of all the claims in the second class just above enumerated then to secure the Exchange National Bank of Norfolk the amount due it by the said firm or its individual members. And the said trustees, for the purpose of executing this trust, shall at once take charge of all the property and effects hereby conveyed, and make an inventory thereof, and proceed to collect the choses in action and all evidences of indebtedness, and to convert the real and personal property into cash as soon as possible, and they may make sale of the real and other personal estate hereby conveyed, at public auction or private sale, at such time or times and place or places and after such notice as to them shall seem best, and they may make such sale upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the second class above enumerated shall have the right to purchase any part or parcel of said property so sold and pay the said trustees therefor at its full face value the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase-money, and to enable as many creditors as possible to become bidders on these terms, the said trustee may have the real estate hereby conveyed, or any part thereof, laid off into lots or parcels, as they may think best. And upon the conversion of the said property hereby conveyed into money the said trustee shall distribute the same to the creditors hereby secured in the order hereinbefore named with all diligence, and in the distribution between those creditors who may have purchased property and paid for the same under the provisions of this deed with a part of the sums found due them respectively, and those who made no purchase, the trustees shall observe such rule of equality as will be just and proper. And the said trustees are authorized and empowered to employ all such agents, attorneys, or laborers as may be necessary for the preservation, protection, handling, shipping, or cultivation of the property hereby conveyed in such manner as shall be for the interest of all concerned, and do all things necessary for the cultivatian, saving, or shipping the crops now growing or which may be planted on any of the lands hereby conveyed for the present year, and in case any of said country lands shall remain unsold during the present year, to make such arrangements or contracts for their cultivation until sold as shall seem best, the charges, costs, and expenses of all which shall be charged as a part of the expenses of this trust. And the said parties of the first part do hereby warrant generally the property hereby conveyed.

24

Witness the following signatures and seals:

(Signed)	ROBT. T. K. BAIN.	[SEAL.]
	FANNY T. BAIN.	[SEAL.]
	GEO. M. BAIN, JR.,	[SEAL.]
	WILLIE F. C. BAIN.	[SEAL.]
	JAMES G. BAIN.	[SEAL.]
	EMILY BAIN.	[SEAL.]
	WM W. OLD, *Trustee.*	[SEAL.]

The words on page three on the margin to be interlined on line 5 of said page "three notes of George M. Bain, Jr., as maker alone, held by the Exchange National Bank, of Norfolk, Va., the overdraft of the said George M. Bain, Jr., at said bank, and the overdraft of Mrs. Annie S. Hall at said bank, and" were written upon the margin of page 3 before the execution and acknowledgment of this deed.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA, *County of Norfolk,* } *To wit:*

I, Norman Cassell, a notary public for the county of Norfolk, in the State of Virginia, do certify that Robert T. K. Bain, whose name is signed to the writing above, bearing date on the 6th day of April, 1885, has acknowledged the same before me in the county aforesaid.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA, *County of Norfolk,* } *To wit:*

I, Norman Cassell, a notary public for the county of Norfolk, in the State of Virginia, do certify that Fanny T. Bain, the wife of Robert T. K. Bain, whose names are signed to the writing above, bearing date on the 6th day of April, in the year 1885, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her said husband, and having the writing aforesaid fully explained to her, she, the said Fanny T. Bain, acknowledged the said writing to be her act and deed, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

25 STATE OF VIRGINIA, *City of Portsmouth,* } *To wit:*

I, Norman Cassell, a notary public for the city of Portsmouth, in the State of Virginia, do certify that George M. Bain, Jr., and James G. Bain, whose names are signed to the writing above bearing date on the 6th day of April, in the year 1885, have acknowledged the same before me in the city aforesaid.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA, *City of Portsmouth,* } *To wit:*

I, Norman Cassell, a notary public for the city of Portsmouth, in the State of Virginia, do certify that Willie F. C. Bain, the wife of George M. Bain, Jr., and Emily Bain, the wife of James G. Bain, whose names are signed to the writing above bearing date on the 6th day of April, in the year 1885, personally appeared before me, in my city aforesaid, and being examined by me privily and apart from their respective husbands, and having the writing above fully explained to them, they, the said Willie F. C. Bain and Emily Bain, acknowledged the said writing to be their act and deed, and declared that they had willingly executed the same and do not wish to retract it.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

VIRGINIA:

In the clerk's office of the court of hustings for the city of Portsmouth, on the 6th day of April, 1885, this deed was acknowledged before me by Wm. W. Old, trustee, and together with the certificate annexed admitted to record.

Teste: C. C. PHILLIPS, *C. C.*

A copy.
Teste: C. T. PHILLIPS, *C. C.*
A. W. HARVEY, *D. C.*

26 And thereupon a temporary restraining order was awarded the plaintiff, copy whereof is printed with the above-recited original bill and here filed, and on the 12th day of May, 1885, the motions for a preliminary injunction and appointment of a receiver were argued, and on that day said motions were overruled and an order entered by the court directing the said trustees to make report to the court monthly of their transactions, and to file an inventory and appraisement of the trust estate in their hands.

And the said trustees having filed an inventory of such estate on the 16th day of June, 1885, and the said defendants, Bain & Bro., having filed their joint and several answer to the plaintiff's said original bill at the July rules, 1885, and the court having granted leave to the plaintiff to file this amended bill at the next succeeding rules—

27 II. The plaintiff, now amending his said original bill, here alleges and shows more fully and in detail the items of indebtedness of Bain & Bro. to the said Exchange National Bank, which on the 31st day of March, 1885, they were wrongfully and fraudulently permitted to withdraw from the said bank, in pursuance of

the agreement of that date, as set forth in paragraph VI of the original bill, as follows:

The said agreement, as charged by the plaintiff and admitted by the defendants, Bain & Bro., in their answer filed at July rules, 1885, was executed and delivered in obedience to the demand that the large indebtedness of Bain & Bro. to the bank should be reduced and securities deposited therefor. Accordingly, upon the delivery of the said agreement to the bank, the said Bain & Bro. were wrongfully and fraudulently permitted by the said George M. Bain, Jr., cashier, to withdraw from said bank and to have marked as cancelled and paid the following items of their said debt:

1st. Nine notes of Bain & Bro., each for the sum of $25,000, aggregating the sum of $225,000.

2d. A due bill of Bain & Bro., carried as cash in the paying teller's cash account for the sum of one hundred and thirteen thousand four hundred and forty-five dollars and twenty-one cents ($113,445.21).

3d. An open account of Bain & Bro. in the sum of one hundred and thirty-three thousand five hundred ($133,500) dollars, in which amount is included five notes of Bain & Bro., each for the sum of $25,000.

4th. A "call loan" due by Bain & Bro. for the sum of eighty-nine thousand six hundred and sixty dollars and ninety cents ($89,660.90) and a further credit of $8,393.89 allowed to them on their deposit account, the whole amounting to the sum of $570,000, which was the assumed value of the stocks and bonds taken therefor, as mentioned in the said agreement of March 31st, 1885; but the plaintiff charges that the said Bain & Bro., individually and as a firm, well knew that the actual value of the said securities and each of them, with the probable exception of the Seaboard Cotton Compress Company stock, was not near fifty per cent. of their face value.

The interest of the said Bain & Bro. in the Richmond Cedar Works, mentioned in said agreement as assigned to be held by said bank as a further security for all other debts and demands due by them to said bank, is in reality no security whatsoever, the said Richmond Cedar Works being at the time actually insolvent and known so to be by the said Bain & Bro.

And the sum of $80,000 face value of Southern Telegraph Co. bonds, therein alleged to be held by Bain & Bro. as collateral, are now sought to be recovered by the receiver of the Southern Telegraph Company in a suit brought since this suit was instituted, and now pending in this court. The plaintiff has been unable to ascertain what interest, if any, the said Bain & Bro. have in said bonds, and has been enjoined by this court, by a temporary restraining order in the suit aforesaid, from making any disposition thereof.

And as to the indebtedness and liability of the said Bain & Bro. as stockholders of the said bank, the plaintiff says that the number

of shares of stock of said bank held and owned by the said Bain & Bro., and the individual members of said firm, is as follows:

28	Bain & Bro	582	shares.
	Geo. M. Bain, Jr.	232	"
	James G. Bain	91	"
	R. T. K. Bain	91	"
	George M. Bain, Jr., with J. B. Whitehead	100	"
	And Thos. A. Bain's estate	91	"
	Total	1,187	"

And the plaintiff here repeats the allegations and charges as to the said shares of stock with the above amendments, as contained in paragraph VII of the said original bill, as fully and to the same intent as if the same were here again written and expressed.

III. The plaintiff here amending his original bill as to the charge that the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain, composing the firm of Bain & Bro., having in possession considerable property, both social assets and individual estate, consisting of moneys, negotiable securities, notes, bills, bonds, and other evidences of debts, and being seized of considerable real estate in the names and occupancy, respectively, of R. T. K. Bain, George M. Bain, Jr., and James G. Bain, did, on the 6th day of April, 1885, with intent to hinder, delay, and defraud the said Exchange National Bank, execute and acknowledge a deed of trust bearing date the 6th day of April, 1885, and caused the same to be recorded, purporting to assign, transfer, and convey unto John T. Griffin, Wm. W. Old, and John B. Jenkins, trustees, all their assets and property of every kind whatsoever, real, personal, and mixed, in trust for the uses and purposes therein expressed, as charged in the paragraph VII of the said original bill, here alleges, by way of amendment, that a large and valuable part of the said personal and real estate of the said Bain & Bro., and of the individual members of said firm, mentioned in the inventory thereof, filed by said trustees herein, was purchased by them, and each of them, with the moneys of the Exchange National Bank of Norfolk, which they, the said R. T. K. Bain, George M. Bain, Jr., and James G. Bain, while occupying the position of cashier and directors of the said bank, as in said original bill charged, and as such sustaining fiduciary relations to said bank, had fraudulently misappropriated to their own use; of all which their said trustees had notice. And the plaintiff, as receiver as aforesaid, asks to be allowed to follow said moneys into the property thus acquired by them, and to have all such property decreed and treated as the property of the said bank.

And the said defendants, George M. Bain, Jr., R. T. K. Bain, and James G. Bain, having filed their joint and several answers to the said original bill at the July rules, 1885, of this court, and in their said answer having failed to state with any degree of particularity with what funds the property so conveyed by them in the said deed of trust was acquired, although specially interrogated thereto, but

having in their said answer, in response to the 3d interrogatory with said original bill, alleged that "the moneys for which Bain & Bro. are indebted to the Exchange National Bank and coming to them went into their general business," and in response to the 5th interrogatory they allege that "the firm real estate was purchased out of the firm moneys, it came out of the general busi-
29 ness," the plaintiff here avers and charges that it has become necessary and proper that the books of account of the said Bain & Bro., and all papers, deeds, and memoranda in their possession or control or in the possession or under the control of the said John T. Griffin, W. W. Old, and John B. Jenkins, as their trustees, relating to any purchases or investments made by the said Bain & Bro., or either one of said firm, since their connection with said Exchange National Bank, or relating to their dealings and accounts with said bank during such connection, shall be produced and submitted to the examination of the plaintiff and his counsel, to enable the plaintiff to ascertain with certainty when and into what property the funds so wrongfully and fraudulently obtained from said bank have by them from time to time been invested. The plaintiff is unable to specify such property in detail for the reason, among others, that access to the said books and papers of Bain & Bro. in the hands of their said trustees has been refused him by the said trustees since this suit was brought, upon his special request of them in writing for leave to examine the same.

IV. The plaintiff, further amending the said original bill as to the averment and charge of notice to the said trustees under the deed of trust aforesaid, as stated in paragraph VII, on page 10 of original bill, here avers and charges that the said John T. Griffin, John B. Jenkins, and Wm. W. Old, trustees as aforesaid, at the time of the execution of the said deed had notice of the suspension of the said banking firm of Bain & Bro. and of their insolvency and indebtedness to the Exchange National Bank of Norfolk, and of the official and fiduciary relations of the said George M. Bain, Jr., as cashier, and of R. T. K. Bain, and James G. Bain, as directors of said bank, and of the intent of the said Bain & Bro. to hinder, delay, and defraud the said bank and its receiver of and from recovering the said indebtedness to it, it being the sole purpose of the plaintiff in the said original bill as in this amendment thereof, merely to charge the said trustees with such knowledge of the facts and circumstances attending the execution of said deed by the grantors therein as to constitute legal notice to them of the intent with which the said grantors are charged to have executed the same, and not to charge the said trustees, Wm. W. Old, John T. Griffin, and John B. Jenkins, or either of them, with any actual participation in the fraud charged against the said grantors; and in all other respects the allegations of the said original bill, save as herein amended, are here repeated as charged therein fully as though the same were here again written.

Forasmuch, therefore, as these doings are contrary to equity and good conscience, and as the plaintiff is remediless save in a court of chancery, where matters of this sort are alone and properly cogniza-

ble, the plaintiff, as receiver of the Exchange National Bank of Norfolk, prays that the Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, as partners of the late firm of Bain & Bro.; the said R. T. K. Bain and Fanny Bain, his wife; George M. Bain, Jr., and Willie F. C. Bain, his wife; and James G. Bain, and Emily, his wife; and John T. Griffin, John B. Jenkins, and William W. Old, as trustees under the deed of trust from the said Bains dated the 6th day of April, 1885; Annie S. Hall, Wright B. Carney, Joseph T. Duke, W. R. Old, Charles E. Jenkins, Wm. M. Jones, Patrick H. Lee, and Isaac P. Lee, partners trading under the name and style of Jones, Lee & Co.; John T. King and George W. King, partners trading as John T. King & Bro.; George Tait, Alexander & Powell, John B. Riddick, and Nestor F. Richardson, partners trading as Riddick & Richardson; the employees of Bain & Bro., and of George T. Wallace, and of Wallace & Son, whose names are to the plaintiff unknown, and all the depositors of the said Bain & Bro., at their banking-house in the city of Portsmouth, and all other creditors referred to in the said deed of trust of April 6th, 1885, whose names are to the plaintiff unknown, may be made parties defendant to this amended bill, may be severally required to make answer thereto as fully and particularly as if each of them had been specially interrogated, but the plaintiff waives answers under oath to this amended bill; that they may — required to make full answer on oath to the interrogatories appended hereto; that a decree may be made setting aside and declaring null and void the said illegal and fraudulent deed of trust, dated the 6th day of April, 1885, to the said alleged trustees, John T. Griffin, John B. Jenkins, and Wm. W. Old, and avoiding the charge thereby attempted to be created upon the estate of the said firm of Bain & Bro., and of each individual member thereof; that proper decrees of reference may be had and accounts ordered of the assets and liabilities of the parties last above-mentioned and of the debts and demands due by them and each of them, especially to the Exchange National Bank; that the books of accounts of the said Bain & Bro., and all papers, deeds, and memoranda in their possession or under the control of the said trustees relating to any purchases or investments made by the said Bain & Bro., or by either one of them, or relating to their dealings and accounts with said bank since their connection with said bank, may be produced and submitted to the examination of the plaintiff and his counsel, and that the plaintiff may ascertain therefrom with certainty when and into what part of the property mentioned in the said deed of trust the funds obtained by them from said bank from time to time were invested, and that all such property may be decreed to belong to the receiver of the said bank, and that all other property mentioned and attempted to be conveyed in the said deed of trust may be declared subject to a lien from the time of the filing of the bill in this suit in favor of the plaintiff for the debts due by the said firm of Bain & Bro., George M. Bain, Jr., R. T. K. Bain, and James G. Bain, to the said Exchange National Bank of Norfolk, in preference to the claims of all other creditors of the said parties; that, pending such proceedings and to prevent the immediate and

irreparable damage threatened to the plaintiff, your honors will issue an injunction restraining the said defendants, John T. Griffin, John B. Jenkins, and Wm. W. Old, trustees as aforesaid, each and all of them and all others, their agents, attorneys, servants, or employees, from further interference with the assets and affairs of the said Bain & Bro., George M. Bain, Jr., Robert T. K. Bain, and James G. Bain, or either of them, and from further proceeding to collect or disburse any of their assets or property, and from any control over the same until the further order of the court; that custody may be taken by the court of the said property, and to that end your honors will appoint a receiver to take charge of all the assets and property mentioned in the said deed of trust of April 6th, 1885,
31 and of any property, moneys, funds, evidences of debt or other assets mentioned in said deed which may have come or be in the possession of the said John T. Griffin, John B. Jenkins, and Wm. W. Old, trustees, or of either of them, under and by virtue of the said alleged deed; and that such receiver may take into his possession and safely keep all the books and papers of the said late firm of Bain & Bro., and of the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain; and that until the time for granting such injunction and appointing such receiver, your honors will grant a temporary restraining order for the purposes aforesaid; that proper process and publication as to the unknown defendants may be had and made, and that this cause may proceed without them on such terms as the court may direct; that a personal decree may be made against the said defendants who have fraudulently intended to hinder, delay, and defraud the said Exchange National Bank and its receiver as aforesaid; that the plaintiff may have his said claims paid and satisfied, and that he may have such other, further, and general relief as to equity may seem meet and the nature of his case entitle him to receive.

May it please this honorable court to grant a writ of subpœna, &c., as prayed above; and the plaintiff, as in duty bound, will ever pray, &c.

WILLIAM H. PETERS,
Receiver of the Exchange National Bank of Norfolk.

T. S. GARNETT,
Of Counsel.

STATE OF VIRGINIA, }
Corporation of the City of Norfolk, } *To wit:*

On this 5th day of August, 1885, before me personally appeared Wm. H. Peters, who upon oath says that the statements made in the foregoing amended bill are true so far as the same are known to him of his own personal knowledge, and those statements contained therein upon information and belief he believes to be true to the best of his knowledge and belief.

WM. H. PETERS.

Sworn to and subscribed before me this 5th day of August, A. D. 1885.

Witness my hand and notarial seal.

[SEAL.] WM. H. WHITE,
Notary Public.

32 In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk, Plaintiff,

vs.

R. T. K. BAIN, GEORGE M. BAIN, Jr., and JAMES G. BAIN, Late Partners, &c., Doing Business as Bain & Bro., *et als.*, Defendants.

On motion of the plaintiff, by his counsel, for leave to file an amended bill in this cause, it appearing to the court that the answer of the said defendants, Bain & Bro, has been filed at the July rules, and no replication thereto being filed—

It is ordered that the plaintiff be allowed to file his amended bill in this cause on or before the next succeeding rule day, and the question of payment of costs is reserved.

Norfolk, Va., July 24th, 1885.

R. O. W. HUGHES, *Judge.*

32½ And on another day, to wit, on the 11th day of May, A. D. 1885, the said defendants, W. W. Old, John T. Griffin, and John B. Jenkins, trustees, &c., filed their joint and several answer to the bill in this cause; and thereafter, to wit, on the — day of September, A. D. 1885, the said W. W. Old, John T. Griffin, & John B. Jenkins, trustees, &c., defendants as aforesaid, filed their joint and several answer to the amended bill in this cause, which said answers are in the words and figures following, to wit:

33 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Va.,

vs.

BAIN & BRO. and Others.

The joint and several answer of Wm. W. Old, John T. Griffin, and John B. Jenkins, trustees, to the amended bill filed against them and others in the above-entitled cause by the said Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va.

These defendants, reserving to themselves all benefit or advantage of exception or otherwise to the said amended bill on account of its many errors, both of law and fact, and of its other imperfections, for answer thereto or to so much thereof as they are advised it is material or proper for them to answer, answering, say: These defendants refer to and adopt their answer to the said plaintiff's original bill

heretofore filed in this cause, and make the same a part of this their answer to the said amended bill. Their answer to the said plaintiff's original bill is in the words and figures following, to wit:

34 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Va.,

vs.

BAIN & BRO. and Others.

The joint and several answer of Wm. W. Old, John T. Griffin, and John B. Jenkins, trustees, three of the defendants in the above-entitled suit, to the bill of the said plaintiff exhibited in the above-entitled court against them and others.

These defendants, reserving unto themselves all benefit or advantage of exception or otherwise to the said bill on account of its many errors, both of law and fact, and of its other imperfections, for answer thereunto or unto so much and such parts thereof as they are advised it is necessary or material for them to make answer to, answering, say:

These defendants believe that the facts stated in the first paragraph of the said bill are true.

They also believe so much of the second paragraph of the said bill to be true as gives the names and residence of the officers and directors of the said bank, the dates of their election, and the time of their service, except in the case of Thomas A. Bain, the recent director of that name having, it seems, been confounded with Thomas A. Bain, dec'd; and these defendants also believe it to be true, as alleged in said paragraph, that the said George M. Bain, Jr., and John B. Whitehead, the cashier and president respectively of the said bank, have, since their election, practically exercised exclusive control and management of all the affairs and business of the said bank, and of all the loans, discounts, and deposits made at the said bank, but this they believe only from hearsay, and have no direct personal knowledge of such fact; and if the rights of these defendants are to be in any way affected by such management of the affairs of the said bank, they require full proof thereof. These defendants have no knowledge of the fact, as charged in the said second paragraph, as to whether the directors of the said bank negligently and faithlessly and in violation of their duty as such, did or did not permit such sole care and management of the said bank's affairs to be exercised by the said president and cashier, and cannot therefore either admit or deny the same, but, to the extent that these defendants are to be affected by this allegation, they require strict proof thereof.

35 It is not true, as stated in the third paragraph of said bill, as these defendants have been informed and believe, that on April 1, 1885, Robert T. K. Bain, George M. Bain, Jr., James G. Bain, and Thomas A. Bain constituted a copartnership and conducted busi-

ness as bankers and brokers under the firm name of Bain & Bro., at the city of Portsmouth. The said parties did, prior to the death of the late Thomas A. Bain, which occurred some years ago, to wit, on the — day of ——, 18—, and up to the time of the death of the said Thomas A. Bain, constitute the firm of Bain & Bro., but, as these defendants are informed and believe, the said copartnership, after the death of the said Thomas A. Bain, was composed of the said Robert T. K. Bain, James G. Bain, and George M. Bain, Jr., and was so constituted on the said 1st day of April, 1885, although at the said date the old copartnership of Bain & Bro., whereof the late Thomas A. Bain in his lifetime was a member, had never been settled up, and much of the copartnership property of the said firm stood in the name of the said Thomas A. Bain.

It is true that on the 2d day of April, 1885, the said firm of Bain & Bro. closed the door of their banking house in said city of Portsmouth at about the same time that the said Exchange National Bank of Norfolk closed its doors, as these defendants have been informed and believe, and then and there suspended payment and discontinued their business of banking, and that they have not resumed the same.

These defendants have no knowledge whatever in regard to the allegation in the said paragraph that for several years past the said firm of Bain & Bro. have been at all times indebted to the said Exchange National Bank in large sums of money, nor of how the same was borrowed and evidenced, as charged, and can, therefore, neither admit nor deny the same; neither have these defendants any knowledge of the allegation in said paragraph that on or about March 31st, 1885, the said Exchange National Bank held and owned the notes of the said Bain & Bro. to the amount of $625,000, represented by renewal notes, as charged, for which the said Bain & Bro. had received moneys of said bank, nor of the allegation that on April 2d, 1885, the said bank held of their said notes $325,000, the former amount having been reduced and withdrawn to that extent on or about the said 31st day of March, 1885, in the manner and by the means stated in said paragraph, and they can, therefore, neither admit nor deny the allegation of said paragraph touching the same.

Neither have these defendants any knowledge of the facts alleged in the said paragraph in regard to the liability of the said Bain & Bro. as endorsers on certain notes made by George M. Bain, Jr., Wallace & Son, and others, amounting to $581,971.49, nor of the charge that the said Exchange National Bank holds no security for the indebtedness mentioned, aggregating $906,971.49; but these defendants have been informed and believe that it is not true, as charged, that the said bank holds no security for said indebtedness; on the contrary, these defendants are informed and believe that the makers of a large proportion of the said rediscounted notes are perfectly good, and that they will be able to meet their said indebtedness.

Neither have these defendants any knowledge of the indebtedness of Bain & Bro. for the sum of $211, as charged in said paragraph.

36 Neither have these defendants any knowledge of the checks for $3,407.68 held by the said Exchange National Bank, which were drawn on Bain & Bro. by various depositors, and received by said bank on April 1st, 1885, but as to these checks these defendants say that they recognize the right of the said Exchange National Bank to stand in the shoes of the said depositors, under the deed of trust hereinafter mentioned, who had drawn said checks on deposits sufficient to meet them, and if presented they will be, as in equity and good conscience they should be, charged up to the said depositors and carried to the credit of said Exchange National Bank, which as to said checks will be allowed to occupy the same position under the said deed, *pro tanto,* as the depositors who drew them.

These defendants have no knowledge of the indebtedness of George M. Bain, Jr., nor of that of James G. Bain, as charged in the fourth and fifth paragraphs of the said bill, except that they have understood that the indebtedness of the said George M. Bain, Jr., on account of the notes of which he was sole maker and the overdrafts which are secured under the deed of trust hereinafter mentioned in the first class, amounted in the aggregate to the sum of forty thousand dollars or more, but of the exact amount these defendants have not been advised except so far as stated in said bill, although they have called on the plaintiff for such statement.

These defendants have been informed and believe it to be true, as charged in the 6th paragraph, that among the notes held by the Exchange National Bank, which had been discounted at said bank on the endorsement of the said Bain & Bro., were several notes of Wallace & Son, aggregating $105,000, but of the dates and amounts of said notes these defendants have no knowledge.

It is true also, as these defendants have been informed and believe, that the said Wallace & Son, composed of George T. Wallace and John G. Wallace, were merchants, lumber getters, and farmers, and for several years past have been associated financially and doing business as customers with the said Bain & Bro., but it is not true, as these defendants have been informed and believe, and therefore charge, that the said Wallace & Son, by means of the endorsement of the said Bain & Bro., obtained large sums of money on said notes from said Exchange National Bank without any security therefor; on the contrary these defendants have been informed and believe, and therefore charge, that the said notes aggregating $105,000 were made and given to the said Bain & Bro. and were discounted by the said Bain & Bro. for the said Wallace & Son, and were rediscounted by the said Bain & Bro. at the said Exchange National Bank, the said notes at the time of said rediscount constituting only a part of a large indebtedness on the part of the said Wallace & Son to the said Bain & Bro.

These defendants deny that as a part or parcel of any scheme of fraud and conspiracy against the said Exchange National Bank, as charged in said paragraph, the said Bain & Bro. on the 6th day of April, 1885, caused and procured to be made and executed to themselves a deed of bargain and sale from the said George T. Wallace and wife and John G. Wallace and wife, conveying to the said Bain

& Bro., in consideration of $151,800, the real and personal property set forth in said deed, a copy of which is filed as Exhibit No. 1 with the bill, or that the said deed, though executed on the said
37 6th day of April, 1885, was antedated on the 4th day of April, 1885, for any such purpose. The facts, purpose, and circumstances of said conveyance will be hereinafter referred to.

And these defendants deny that on the said 6th day of April, 1885, the said George T. Wallace and John G. Wallace, as a part of any scheme and fraudulent design against the said Exchange National Bank, caused to be executed the deed to the Richmond Cedar Works, Limited, mentioned and referred to in said paragraph of said bill, a copy of which is filed as Exhibit 2 with said bill.

These defendants have been informed and believe it to be true that the said Exchange National Bank of Norfolk did at the time said deed was executed hold certain notes of the Richmond Cedar Works, Limited, for about $139,101.80, and that the said Wallace & Son were endorsers thereon, but these defendants deny that the said deed of April 6th, 1885, was accepted from the said Wallace & Son with intent to hinder, delay, and defraud the said Exchange National Bank of the debt owing it by the said Wallace & Son, and that the property conveyed by the said deed was reconveyed to the said trustees in furtherance of a fraudulent intent, as charged in said bill.

These defendants have no knowledge whatever in regard to the charges made in the said 6th paragraph of the said bill touching any conspiracy between the said George M. Bain, Jr., as cashier, and Robert T. K. Bain and James G. Bain, as directors of said Exchange National Bank, to obtain money from the said bank, nor of any fraud practised upon said bank whereby moneys were obtained, nor of the transaction between Bain & Bro. and the said bank on March 31st, 1885, except as hereinafter stated. It appears that the said Bain & Bro. did incur liability exceeding in amount one-tenth of the capital stock of said bank and to a greater extent than is allowed by law.

These defendants have been informed and believe that the said Bain & Bro., or the individual members of said firm, owned a large number of the shares of stock of the said Exchange National Bank, but how much and in whose names the said shares stood they do not know, and cannot of their own knowledge answer the statement in regard thereto in the 7th paragraph of said bill.

These defendants have no knowledge whatsoever, and never had any such knowledge of any conspiracy, as charged in said 7th paragraph, on the part of the said George M. Bain, Jr., R. T. K. Bain and James G. Bain, as individuals, partners composing the said firm of Bain & Bro., or as cashier and directors respectively of said bank, to execute a fraudulent deed of trust to these defendants with intent thereby to delay, hinder, and defraud the said Exchange National Bank of Norfolk of and from the large sums of money in the said bill mentioned and set forth, nor with the intent to delay, hinder, and defraud the said bank and the plaintiff as receiver thereof, from any debt or liability to the said bank as stockholder thereof, and in

fraud of sections 5151 and 5234 of the Revised Statutes of the U. S., nor do these defendants believe that such intent existed.

And these defendants deny any and all knowledge of any intent whatsoever on the part of the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain, either as composing the firm of Bain & Bro., or as individuals, in making and executing the said deed
38 of April 6th, 1885, a copy of which is filed as Exhibit A with the bill, to hinder, delay, and defraud the said Exchange National Bank; and they deny any and all knowledge of any unlawful and inequitable conspiracy and design on the part of the said Bain & Bro., or of the said individual members of said firm, or of either of them, by the execution of said deed to delay, hinder, and defraud the said bank of and from the debts due to it by them.

And these defendants deny that the said deed is fraudulent and void, or that it was voluntary and upon consideration not deemed valuable in law, or that the designation of property thereby conveyed is insufficient to pass title.

And these defendants say that it is true that the said Bain & Bro. and the individual members of the said firm became insolvent, and, knowing their insolvency they closed the doors of their banking-house in the city of Portsmouth, and they made a full and complete assignment of all the assets of the said firm, and of all their property, and the property of each of them, both real and personal, of every kind and description whatsoever and wherever situated or found, to these defendants, by the said deed of April 6th, 1885, upon the trusts and for the uses and purposes in said deed set out, to which a reference is here made for its terms; but these defendants had no knowledge and never had any such knowledge of any intention on the part of the said George M. Bain, Jr., Robert T. K. Bain, and James G. Bain, either as composing the firm of Bain & Bro., or as individuals, to hinder, delay, and defraud the said Exchange National Bank of Norfolk of or from recovering the said indebtedness due to it.

And in regard to the allegation in the said 7th paragraph, p. 10, to the effect that the said Wm. W. Old was on the said 2d day of April, 1885, and for a long time prior thereto, the attorney, counsel, and legal adviser of the said firm of Bain & Bro., and had full knowledge of its assets and liabilities, and was present with the said Bain & Bro. daily from the 2d to the 6th day of April, 1885, aiding, advising, and preparing the said deed of trust, and finally consummating the said grantors, intent by drawing, executing, acknowledging, and recording the said deed, the said Wm. W. Old, answering for himself in respect to the said allegation and the wilful and malicious insinuation and charge against him conveyed thereby, says:

That is not true that he, the said Wm. W. Old, was ever the attorney, counsel, or legal adviser of the said Bain & Bro. in regard to any of its matters in connection with the Exchange National Bank, or that he ever had any knowledge or intimation of the same prior to April 2, 1885, nor did he prior to that date know anything whatever of the affairs of Bain & Bro. or of any embarrassment of said firm. For some years past he had been employed as counsel for the

said Bain & Bro. in special cases requiring his services, but beyond such knowledge as counsel would gain about the business of a client when employed in particular cases, he knew absolutely nothing about the general affairs and assets of Bain & Bro., and was not even called in to advise them in their negotiations with the Exchange National Bank on or about March 31, 1885, and was utterly ignorant of the embarrassment either of the said Exchange National Bank or of the said Bain & Bro. until late in the day upon the morning of which the said bank and Bain & Bro. closed almost simultaneously their doors; and when he heard of their mis-
39 fortune it was as much a surprise to him as to any other individual in this community. So far from knowing or suspecting that such a disaster as the failure of the said bank and firm would occur this defendant, early on the morning of April 2d, 1885, left the city of Norfolk and went to Princess Anne C. H. to attend the trial of a case in the circuit court of said county, and while there engaged in this attendance upon court he was suddenly requested by a messenger from Robert T. K. Bain to return at once to the city. This defendant did so and met the said Robert T. K. Bain about 6 o'clock on the evening of April 2d, and from that time to the 6th of April, 1885, was in daily communication with him as his counsel and the counsel of his firm, but that this defendant was during that time or any part or one moment even of it engaged or associated with said firm in furthering and consummating a fraud, as insinuated, is both false and calumnious.

When this defendant met the said Robert T. K. Bain on the said 2nd day of April, 1885, he was overwhelmed with the shock and the contemplation of the results of the failure of the said Exchange National Bank and the banking-house of Bain & Bro. upon those who had reposed confidence in said institutions in depositing their money with them. His only purpose, expressed to this defendant, was to make a full and complete surrender of everything that he or the firm or any of the members thereof had, in such manner as would yield the largest and speediest dividend and as would be just and proper. No other design was expressed or discussed, and the deed which was afterwards executed, a deed in which the wives of all the parties joined without a murmur, shows how complete the surrender was.

But preliminary to this surrender there were other matters to be disposed of. Among the assets of Bain & Bro. was a large indebtedness on the part of Wallace & Son. This indebtedness amounted to much over two hundred thousand dollars, independent of the notes, aggregating $105,000, hereinbefore mentioned. George T. Wallace and John G. Wallace were present and ready and willing to turn over all their property, real and personal, to Bain & Bro. in payment of the said indebtedness then held by said Bain & Bro. upon the assumption by Bain & Bro. of whatever might be due the laborers and employes of said George T. Wallace and of Wallace & Son, which they wished also to secure. The wife of George T. Wallace, however, being advised of her rights, required a settlement to be made upon her in consideration of her relinquishment of her

dower in the real estate of her husband, which was valuable. This settlement was arranged and made upon the best and most equitable basis that could then be suggested or devised. Instead of making a deed of trust, as was first contemplated, securing first their labor claims and then the indebtedness then due Bain & Bro., which was more than enough to absorb all the property of Wallace & Son, to simplify the matter, as it had already been determined by the said Bain & Bro. that they would make a deed in which they would secure the claims of their own laborers and employes, among those first to be paid, it was decided to be best and a saving of expense for the said Wallace & Son to make a deed conveying all their property directly to said Bain & Bro., and that said Bain & Bro., as a part of the consideration of said deed to them, should assume and pay off the claims of the laborers and employes of said George T. Wallace and Wallace & Son, which was accordingly done. These labor claims were a very trifling sum compared with the value of the property conveyed; and it was considered as very important that these laborers, consisting principally of farm hands (of whom there were a large number) should be provided for, as otherwise they would abandon the work about which they were engaged and cause great loss to the trust subject.

And in regard to the deed to the Richmond Cedar Works, inasmuch as it appeared that the swamp lands which were conveyed in said deed from Wallace & Son to said works had been purchased by said Wallace & Son in part expressly for use in supplying the Richmond Cedar Works with the timber necessary for operating said works, and had been so used, the said Bain & Bro. being connected with both Wallace & Son and the said Richmond Cedar Works, and inasmuch as it was considered as virtually stopping the operations of the said works if the said lands should be divorced from said works, and inasmuch as the said works were indebted in a large sum of money to the said Exchange National Bank, which the said works would have no adequate means of paying, in such case the said Wallace & Son conveyed directly to said works, instead of to the said Bain & Bro., the lands and property mentioned and set forth in said deed, in consideration of $55,000, and took in payment an order for $31,885.71 on Bain & Bro., who were debtors to the said works for that amount, and notes secured by a vendor's lien on said lands for the balance, which were assigned by said Wallace & Son to Bain & Bro. and constitute a part of their assets. This arrangement was manifestly for the benefit indirectly of the said Exchange National Bank, and was intended so to be, for it put the means in the possession of said works, which own valuable property near Richmond, Va., of carrying on their business of manufacturing, including actual assets amounting to $31.885.71 or thereabouts, so that said works, as was expressly then represented, will be enabled to pay its indebtedness to said Exchange National Bank if not unduly pressed.

After these matters were arranged, which required much time and consideration, the deed of trust of April 6th, 1885, to the trustees therein named, viz., John T. Griffin, John B. Jenkins, and Wm. W. Old, was executed and delivered; and in the preparation of that

deed, so far as this defendant is concerned, he gave such legal advice as he was called on to give, and drew it to meet the views of his clients, as any other attorney faithful to his trust would and ought to have done. In making this deed it seemed to be the aim and design of the said Bain & Bro. to protect their depositors in Portsmouth equally with the Exchange National Bank after taking into consideration the assets of Bain & Bro., which had already been placed in the possession of the said Exchange National Bank, which assets, as this defendant was then informed by the said Robert T. K. Bain, consisted of the stocks, &c., which were received by the said bank on March 31, 1885, and the rediscounted notes mentioned in the bill. The depositors of Bain & Bro. numbered about one thousand, as this defendant was informed, and the amounts due them and other parties mentioned in said deed (exclusive of the Exchange National Bank) aggregated nearly one million of dollars, and it was estimated by the said Bain & Bro. that what the Exchange National Bank had received and would receive under the said deed of
41 trust would in the aggregate amount to more than its proper proportion, and more than what the depositors of Bain & Bro. would receive under the said deed, and it was aimed earnestly to make a just and equal distribution of said assets. All the said debts secured by said deed were *bona fide* debts of the said Bain & Bro. or of some of the individual members of said firm, and they so appear from the face of the deed, except the labor claims of Geo. T. Wallace & Wallace & Son, the overdraft of Mrs. Annie S. Hall, and the notes of the Greenville Land and Lumber Co., and as to these last the liability for said labor claims of George T. Wallace and Wallace & Son has been explained. The overdraft in the name of Mrs. Annie S. Hall was in fact, as the defendant was informed, the debt of the said Geo. M. Bain, Jr., which he acknowledged himself bound to pay, while the said notes of the Greenville Land and Lumber Co. were endorsed by the said Bain & Bro., who were, therefore, liable for the same.

And the said defendants, John T. Griffin and John B. Jenkins, say that they knew nothing of the execution of the said deed, nor of the fact that they were trustees therein even, until after said deed was executed, and that they believe the statement of their cotrustee, Wm. W. Old, in stating his connection there*of* is true, and upon his statement adopt his answer in respect thereto.

In regard to the allegations in the eighth paragraph of said bill, these defendants say that the provision in said deed in reference to allowing any creditor secured in the 2d class in said deed to purchase any of the property conveyed thereby at any sale at public auction, and pay for the same, at its full face value, the amount found due such purchaser secured by said deed, or so much thereof as may be necessary to enable such creditor to pay for the same, was embodied therein after grave and mature consideration, and because it was deemed absolutely essential to prevent a sacrifice of the large amount of real estate conveyed by said deed, and to enable the creditors secured as between themselves to stand in the best possible position as bidders, for if such provision had not been embodied the

inevitable result would have been a great sacrifice of the said real estate, of which the numerous creditors secured would not get the benefit as bidders, because in most cases their means were so locked up that they would find themselves unable to comply with any reasonable terms of sale; and, moreover, it was considered that the result would be to bring about a speedy settlement of this large trust. These defendants submit that this provision is wise and just, and does not, as charged, render the deed "invalid, uncertain, inequitable, fraudulent, or void." It cannot affect the creditors secured in the first class in said deed, because those creditors are to be first paid, and there are sufficient assets conveyed by said deed, which will be collected or realized without any sale thereof, to pay said first-class creditors, and even if the assets to be collected or otherwise realized without a sale should prove insufficient to pay off the said first preferred claim, the power given the said trustees to sell any of the said property at private sale would enable them to obviate any difficulty in this respect; so that if the provision authorizing the postponed creditors to bid for the trust property sold at auction on the terms of being allowed to pay for their purchases with the debts due them would be otherwise inconsistent with the preference
42 given the preferred class, and for that reason affect the validity of the deed, which they are advised would not be the case, the question does not and cannot arise in the actual condition of the trust fund.

And in regard to the discretionary power the exercise of which the plaintiff says would be unjust and inequitable, these defendants say that they do not foresee any difficulty in regard to the equality which ought to be observed by them between those creditors who may have purchased property and paid therefor out of the amount secured to them under said deed and those who may not have purchased in the distribution of any assets which may be in their hands, but if there should be any the courts, to which these defendants would have a right to appeal, can easily remove any such difficulty; therefore there is nothing in the objection that such provision is "deceptive, illusory, fraudulent, and void."

To the charge that the deed is fraudulent and void because of the discretion granted the trustees to sell trust property on credit these defendants say that they suppose, without such express grant, they would have been clothed with such discretion as essential to the successful execution of this trust, embracing so much and such divers sorts of property; and they are informed that such provisions in trust-deeds are familiar to and unchallenged by our courts. And, in respect to the contention that the deed is void because of the discretion allowed the trustees to go on for the present year, with the cultivation of the crops already much advanced on certain of the lands, and to make arrangements or contracts for their cultivation until sold, these defendants cannot see on what ground it rests, for, without such course of dealing with this part of the trust subject, it is palpable there must be large loss to the trust subject because of the already heavy outlay upon the crops of this year, which would be otherwise wasted, and besides, as the lands cannot all be sold at

once, if they should be abandoned they must greatly decline in value; and, in fact, in regard to some of the lands Bain & Bro. were under contract for their cultivation.

These defendants do not consider it worth while to vindicate, against the plaintiffs' assault, that provision in the deed authorizing them "to employ all such agents, attorneys, or laborers as may be necessary for the preservation, protection, handling, shipping, or cultivation of the property hereby conveyed in such manner as shall be for the interest of all concerned."

If the plaintiff has wrought himself up to the conclusion that the trustees should not be clothed with the power to protect the trust property they cannot suppose he will carry the court with him in said conclusion.

The allegation in the 9th clause of the bill that the trustees "have taken possession of all the assets and property, real, personal, and mixed, social and individual, of the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain" these defendants admit to be true, and true without the exception in the bill made of the "dwelling-houses of the said parties and the personal property therein," or of the "books, accounts, and papers of the late firm at their place of business in Portsmouth."

These defendants are in possession of said dwelling-houses, and personal property in them, and said books, accounts, and papers.

They have deemed it fortunate that the interest of the trust
43 fund has consisted with the humanity of the occasion, in respect to the occupancy of those dwellings, and that they could have them temporarily taken care of, with their contents, without charge to the fund, by their late owners, said Bain & Bro. They have taken an inventory of the contents of said dwelling-houses.

In respect to the allegation that "the said R. T. K. Bain is in charge of the said books, accounts, and papers, and in daily attendance at and apparently in charge of the said banking-house or place of business" in Portsmouth, Va., these defendants say it is no further true than that said Bain, in compliance with the wishes of these defendants (who could not get along without his assistance in settling up the unsettled accounts of this vast business), is in attendance at said banking-house aiding in making such settlement, and without compensation; and it is due to him and agreeable to these defendants to add that he evinces as much interest in making this settlement as if he alone were concerned.

And, in repect to the complaint that "though required to prepare an inventory of all the said property they have not yet done so," these defendants say that the trust property consists, in the main, of real estate, situated in Norfolk, Nansemond, Southampton, and Princess Anne counties, and the city of Portsmouth, notoriously the property of the said Bain & Bro. (until conveyed in the trust deed to these defendants), the title deeds of which are of record, as to which there would seem to be no occasion for haste in making out an inventory, and which it will be more suitable to make out when the surveys and plats are finished of the proposed divisions of much of it and it is catalogued, as is proposed to be done as soon as it can

be effected, and about which work these defendants were engaged when this restraining order was issued. (One farm being far more valuable, in the opinion of the trustees, as an addition to Portsmouth city than for farming purposes they propose to subdivide into a thousand or more lots.)

And as to another complaint, that the trustees have not "made known to the plaintiff or other creditors what is the character, amount, or value of the assets of Bain & Bro., and whereof they have so taken possession," these defendants say that—they except the real estate above spoken of—the assets, for the most part, consist of the debts due to Bain & Bro., and that, in the unsettled condition in which they found their books, it was not practicable to say what was the value of that part of their assets, nor can these defendants say, until their accounts are stated and the books settled up, what is their value.

They have been diligently at work to complete the investigation and settlement, and, as soon as they finish it, they intend to make a complete inventory, embracing, together with a list of said dues to Bain & Bro., the lands, with diagrams of the same, as they appear after the divisions aforesaid, and of the personalty other than said dues to Bain & Bro., of which other personalty they have taken lists, which are open to the inspection of the plaintiff and all others whom it may concern.

And, in reply to the charge that the defendants, trustees under the said deed of trust, "in furtherance of the said fraudulent intent wherewith the same was made, are proceeding to misapply and misappropriate the moneys so collected by them to the debts
44 and demands of the creditors of the said grantor, as mentioned in said deed," these defendants say that, while they have settled some accounts with debtors to the trust fund, allowing proper offsets where established, they have, excepting some few dues to laborers, amounting to a thousand or twelve hundred dollars, paid but one sum, to wit, $180.00, and which sum was paid to prevent the sale, under a trust deed, of part of the trust subject which was liable to be sold under such deed and the sale whereof was threatened.

And now, having fully answered, these defendants pray to be hence dismissed with their reasonable costs in their behalf expended.

WM. W. OLD,
JOHN T. GRIFFIN,
JOHN B. JENKINS,
Trustees.

JAMES ALFRED JONES,
LEGH R. PAGE,
RICHARD WALKE,
Counsel, &c.

UNITED STATES OF AMERICA, *Eastern District of Virginia:*

This day personally appeared before me William W. Old, John T. Griffin, and John B. Jenkins, and made oath that the matters and things contained in the foregoing answer, so far as stated of their

own knowledge, are true, and so far as stated upon knowledge and information derived from others they believe to be true.

Given under my hand and seal this — day of May, A. D. 1885.

——— ———.

45 And, further answering, these defendants say, in reply to the 2nd paragraph of the said amended bill, that they have no knowledge of their own in regard to the items of indebtedness allowed to be withdrawn by Bain & Bro. from the Exchange National Bank on the execution by them of the agreement and transfer of March 31st, 1885, but upon information they believe that the answer of Bain & Bro. to the amended bill in respect to the withdrawal of said items is in every respect correct and true, and they therefore deny the allegation of fraud contained in the said amended bill in reference to the withdrawal of said items of indebtedness.

They further say that they have no knowledge or information as to the condition of ths Richmond Cedar Works at the time of said agreement, or of Bain & Bro.'s belief in respect thereto, or as to the said Southern Telegraph Company bonds; but, if the allegations in said amended bill in respect to said matters have any bearing upon the issue in this cause, which they deny, they call for full proof thereof; and these defendants have no knowledge as to the number of shares of stock held by Bain & Bro., or by the individual members of said firm, in the said Exchange National Bank.

46 And these defendants, further answering, deny the charge contained in the said amended bill, that a large and valuable part of the personal and real estate of Bain & Bro., and of the individual members of said firm, was purchased with the moneys of the Exchange National Bank of Norfolk, which the said R. T. K. Bain, Geo. M. Bain, Jr., and Jas. G. Bain, while occupying the position of cashier and directors of the said bank, and as such sustaining fiduciary relations to said bank, had fraudulently misappropriated to their own use. They deny that any of the property was so purchased by the said firm or the individual members thereof.

And these defendants, further answering, wholly deny any right on the part of the said plaintiff or his counsel to examine the books and papers of Bain & Bro. They say that such claim on their part is unfounded and is unknown to the practice of this court. They admit that they denied to the plaintiff, as stated in said amended bill, permission for him or his counsel to make such inspection or examination when demand was made therefor by the said plaintiff; and they also show (which the said amended bill does not

47 do) that this court likewise denied such permission, upon motion being made to it therefor by the said plaintiff.

And these defendants, further answering, deny the allegation of the said amended bill, that the said deed of assignment of Bain & Bro. was made with intent to hinder, delay, and defraud the said bank; they deny that there was any fraudulent intent whatsoever, actual or constructive, on the part of the said grantors; and they deny that they, the said defendants, had notice, legal or otherwise, of any fraudulent intent on the part of said grantors.

And now, having fully answered, these defendants pray, &c.

WM. W. OLD, *Trustee.*
JOHN B. JENKINS, *Trustee.*
JNO. T. GRIFFIN, *Trustee.*

JAMES ALFRED JONES.
LEGH R. PAGE.
RICHARD WALKE.
p. d.

STATE OF VIRGINIA, *City of Portsmouth,* } *To wit:*

This day personally appeared before me John B. Jenkins and John T. Griffin, trustees, and made oath that the matters and things contained in the foregoing answer, so far as stated of their own knowledge, are true, and so far as stated upon knowledge and
48 information derived from others they believe to be true.

Given under my hand and seal this first day of September, A. D. 1885.

[Seal Wm. G. Maupin, Jr., Notary Public, Portsmouth, Va.]

WM. G. MAUPIN, JR.,
Notary Public.

STATE OF WEST VIRGINIA, *County of Greenbrier,* } *ss:*

This day personally appeared before me Wm. W. Old, trustee, and made oath that the matters and things contained in the foregoing answer, so far as stated of his own knowledge, are true, and so far as stated upon knowledge and information derived from others he believes them to be true.

Given under my hand and seal this the 4th day of September, A. D. 1885.

[Seal J. F. Garing, Notary Public, Greenbrier Co., West Va.]

JOHN F. GARING,
Notary Public.

Fee, 50 c.
Paid. J. F. G.

48½ And on another day, to wit, the 12th day of May, A. D. 1885, the said defendants, R. T. K. Bain, George M. Bain, Jr., and James G. Bain, filed an affidavit in the said cause, which affidavit is in the words and figures following, to wit:

48⅓ In the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk. In Equity.

W. H. PETERS, Receiver, &c., *vs.* BAIN & BRO. *et al.*

Before me, a notary public in and for the city of Portsmouth, State of Virginia, this day personally appeared George M. Bain, Jr., James G. Bain, and Robert T. K. Bain, who, being duly sworn, depose and say that they, with others, have been made parties defendants in the above-entitled suit, and were served with copies of the

plaintiff's bill about 4 p. m. on Thursday, the 7th day of May, A. D. 1885, and since receiving said copies they have not, for want of time and the possession of the books and papers of the firm of Bain & Bro. and of the Exchange National Bank of Norfolk, been able to make full and detailed answer to the allegations of said bill, but, in response to so much thereof as they are advised is material and relevant to the issue now depending, they say that its allegations as to the incorporation of said bank, its insolvency, the insolvency of Bain & Bro., the appointment of the plaintiff as receiver of said bank, and the relation of affiants to said bank as directors therein, are true.

They further say that they are largely indebted to the said bank both as a firm, individually, and jointly with others, and that Bain & Bro. are the holders of 1,087 shares of the capital stock of said bank deposited with them as bankers, and of as high dignity and entitled to just as much consideration as the debt due by them to said bank; and these affiants deny that in the execution of said assignment they had any purpose or intent to defraud said bank, or that there was any conspiracy between them and the trustees therein named to effect any such alleged fraudulent intent and purpose.

48½ They further say that when said bank was called upon by the Comptroller of the Currency to increase its solvent assets and to raise its reserve fund to the amount required by law they did, at the request of said bank, execute and deliver on the 31st of March, ult., the agreement in writing set forth and described in said bill. The securities surrendered in pursuance of that agreement were of the face value of $640,000.00, and were then and are now believed to be of the actual value of not less than $500,000.00, and shortly before that time affiants had turned over to said bank bills receivable amounting to about $130,000.00.

Having thus for the security of said bank divested themselves of nearly all of their bankable assets, these affiants felt it to be their duty from the residuum of their property to make the best provision they could for their creditors, including the said bank, and accordingly made the assignment of April 6th, 1885, a true copy of which is exhibited with said bill, the paramount intent and purpose of which assignment was to bring about as near as practicable an equitable distribution of their property among the creditors therein mentioned. And these affiants aver that every one of the debts secured by the said deed of assignment are *bona fide* debts due in large part to the citizens of Portsmouth and the surrounding country for money deposited with them as bankers, and of as high dignity and entitled to just as much consideration as the debt due by them to said bank. And these affiants deny that in the execution of said assignment they had any purpose or intent to defraud said bank, or that there was any conspiracy between them and the trustees therein.

48⅝ These affiants deny that they, or either of them, directly or indirectly, communicated to the said Griffin and Jenkins, or either of them, two of the trustees, their purpose to make the assignment, and they do not believe they had any knowledge whatever in regard to

the assignment until it had been duly executed and delivered to their cotrustee, W. W. Old, Esq.; and they further say that they, nor either of them, ever at any time made any communication whatever to the said Griffin and Jenkins as to their dealings and transactions with said bank, and they believe that the said Griffin and Jenkins had no knowledge whatever as to such dealings and transactions prior to the execution of the said assignment.

They further say that they had no communication whatever with Mr. Old in regard to the assignment until they had resolved upon its execution, when they sent for him to prepare the assignment and such other papers as would enable them to make available for their creditors as a part of their estate the large debt due them from Wallace & Son. They had to send to Princess Anne county for Mr. Old. Upon his arrival, and when told of their wishes, he seemed much surprised. Until then he had never been informed as to the state of the account between them and the bank, and while he had been
49 counsel for affiants in several matters, yet those matters were entirely distinct and disconnected with their dealings with the said bank; and, so far as they know and believe, the said Old knew no more of their business and financial condition than the general public. In that interview and the interviews that followed they gave him such information as would enable him properly to prepare the deed. He was also informed of the provision, already made for the security of the bank, which it was then and is now believed would give it an equal if not a larger portion of their property. To accomplish the above purpose and insure an equality in the distribution of their assets, their wives united in the assignment, relinquishing their valuable rights of dower.

And these affiants further say that it is impossible for them to designate with what money the property conveyed by said deed of assignment was bought; some of this property was inherited; that which was purchased was acquired from time to time from the year 1865, when they began a banking business in the city of Portsmouth, and, it is believed, usually paid for out of the general fund in their said banking business.

And further these deponents say not.

(Signed) GEO. M. BAIN, JR.
J. G. BAIN.
ROBT. T. K. BAIN.

50 Subscribed and sworn to before me, Norman Cassell, a notary public in and for the city of Portsmouth, in the State of Virginia, on this the 11th day of May, A. D. 1885.

Given under my hand and seal.

[SEAL OF NOTARY.] (Signed) NORMAN CASSELL,
Notary Public.

[Endorsed:] Wm. H. Peters, receiver, &c., *vs.* Bain & Bro. *et al.* A copy. Filed May 12, 1885. Chas. T. Barry, dep'y clerk.

51 And on another day, to wit, the 12th day of May, A. D. 1885, the court caused the following order to be entered, which said order is in the words and figures following, to wit:

52 In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk,

vs.

BAIN & BRO. and Others.

This cause, wherein a temporary restraining order was awarded on the 2d day of May, 1885, came on this day to be heard upon the plaintiff's bill and exhibits therewith filed, and upon the motion of the plaintiff for a preliminary injunction and the appointment of a receiver in this cause, and upon affidavits filed and read upon the hearing of said motion, and upon the joint and several answer of the defendants, John T. Griffin, John B. Jenkins, and William W. Old, as trustees in the deed of trust in the bill mentioned, which said answer was filed and read upon the hearing of said motion, together with the affidavit- of R. T. K. Bain, George M. Bain, Jr., and James G. Bain, defendants, and was argued by counsel.

On consideration whereof the court doth overrule the said motion and discharge the temporary restraining order heretofore
53 awarded in this cause, but without prejudice to any application for the renewal of said restraining order and motion.

And the court, by the consent of the defendants, John T. Griffin, John B. Jenkins, and Wm. W. Old, the trustees in the deed dated April 6th, 1885, from Robert T. K. Bain and others in the bill and proceedings mentioned, doth order that the said defendants, trustees as aforesaid, do make to this court monthly reports of their proceedings under the said trust deed, but no creditor under the said deed is to be paid from the funds in the hands of the trustees without notice to the plaintiff and leave of the court.

And the said trustees are required to make and file in this cause a true inventory and appraisement of the property whereof they have taken charge.

And all other questions are reserved until the further hearing, and the cause is continued.

Norfolk, 12th May, 1885.

M. R. WAITE,
Chief Justice.

54 And on another day, to wit, the — day of July, A. D. 1885, the said defendants, R. T. K. Bain, George M. Bain, and James G. Bain, filed their joint and several answer to the bill in the said cause.

And thereafter, to wit, on the — day of September, A. D. 1885, the said defendants, R. T. K. Bain, James G. Bain, and George M. Bain, Jr., filed their joint and several answer to the amended bill

in this cause, which said answers are in the words and figures following, to wit:

55 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Virginia,

vs.

BAIN & BRO. and Others.

The joint and several answer of R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain, as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners, doing business under the firm and style of Bain & Bro., and also as constituting the late firm of Bain & Bro., and also as individuals, to the amended bill filed against them and others in the above-entitled cause by the said Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va.

These defendants, reserving to themselves all benefit or advantage of exception, or otherwise, to the said amended bill on account of its many errors, both of law and fact, and of its other imperfections, for answer thereto, or to so much thereof as they are advised it is material or proper for them to answer, answering, say:

These defendants refer to and adopt their answer to the
56 said plaintiff's original bill heretofore filed in this cause, and make the same a part of this their answer to the said amended bill.

Their answer to the said plaintiff's original bill is in the words and figures following, to wit:

57 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank,

vs.

BAIN & BRO. and Others.

The joint and several answer of R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners doing business under the name and style of Bain and Bro., and as also constituting the late firm of Bain and Bro., and of the said R. T. K. Bain, George M. Bain, Jr., and James G. Bain, defendants in the above-entitled suit, to the bill of the above-named plaintiff against them and others in the above-entitled court.

These defendants, reserving unto themselves all benefit or advantage of exception or otherwise to the said bill on account of its many errors, both of law and fact, and of its other imperfections, for answer thereto or unto so much and such parts thereof as they are advised it is necessary or material for them to make answer to, answering, say:

These defendants believe that the facts stated in the first paragraph of said bill are true.

These defendants also believe that so much of the second paragraph of the said bill as gives the names and residences of the directors of the said Exchange National Bank, the dates of their election, and time of service, is true, but they deny that the said Geo. M. Bain, Jr., and John B. Whitehead have exercised the exclusive control and management of the affairs and business of the said bank, and that the directors of the said bank were guilty of the negligent and faithless violation of their duty as charged.

It is not true (as charged in the third paragraph of the said bill) that on the first day of April, 1885, and for a long time prior thereto, the said R. T. K. Bain, Geo. M. Bain, Jr., James G. Bain, and Thomas A. Bain constituted a copartnership and conducted a business as bankers and brokers under the name and style of Bain and Bro.; on the contrary, the firm of Bain and Bro. on said date was composed only of the said R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain. The said Thomas A. Bain departed this life on or about the 18th day of October, 1877.

58 It is true, as charged in the said paragraph, that on the second day of April, 1885, the said firm of Bain & Bro. closed the doors of their banking-house in Portsmouth very shortly after the suspension of the said Exchange National Bank on said day, and have not resumed business.

It is true that for some years past the said firm of Bain & Bro. have been indebted to the said Exchange National Bank in sums of money varying in amounts, and such sums were evidenced by their notes, which were discounted by the said bank, as alleged, but it is not true that for said notes the bank never held any security whatever, as charged.

It is true that the said Exchange National Bank did on March 31, 1885, hold the notes of Bain and Bro. aggregating $625,000 or thereabouts, and that prior to April 2nd, 1885, the said amount had been reduced to $325,000 or thereabouts.

It is true that the said Bain & Bro. were and are endorsers on certain notes (which they had endorsed and most of which were rediscounted) amounting in the aggregate to about $581,971.49, the exact amount being $593,251.99, which notes had not become due on April 2nd, 1885, but the makers or the other endorsers of a large part of the said notes are perfectly responsible (some of them as good as can be found in this community) and will protect their said notes when they fall due; and it is not true that the said Exchange National Bank holds no security whatsoever therefor; and, in addition to the said security above-mentioned, these defendants say that the said Exchange National Bank is secured under the deed of trust of April 6, 1885, mentioned in said bill for another large part of said notes forming a portion of the said aggregate $581,971.49, viz., for the notes of which George M. Bain, Jr., is sole maker, aggregating $31,000, endorsed by Bain & Bro., and also for the notes of the Greenville Land & Lumber Company, aggregating $102,000, endorsed by Bain & Bro. And these defendants here deny that said

Bain & Bro. have attempted by a fraudulent conspiracy and design to render the said notes absolutely worthless to the said bank. Said charge is utterly false.

And these defendants believe it to be true that they are indebted to the said bank for the several due bills, aggregating $211, in said paragraph mentioned, but they had lost entire sight of them. They were cash items which would at any time have been settled, and they suppose they were not sent in to be paid at their banking-house in Portsmouth either from oversight or owing to the press of more important matters.

These defendants cannot answer in regard to the checks, aggregating $3,407.68, drawn by various depositors of Bain & Bro. mentioned, because they have no knowledge thereof, except from the statement in the bill, but they are advised, and learn from reading the answer of the trustees in the deed of April 6th, 1885, that they, the said trustees, recognize the right of the said Exchange National Bank, as the holder of said checks, to stand in the shoes of the said depositors under the deed aforesaid.

It is true that the said Geo. M. Bain, Jr., was on the 2nd day of April, 1885, indebted to the said bank on joint account with John B. Whitehead in the several sums mentioned in the fourth paragraph of said bill, but for all, or nearly all, of said indebted-
59 ness the said bank held on said second day of April, 1885, collaterals, which at the time said indebtedness was contracted were considered as at least equal to the said indebtedness; and in some instances said collaterals, deposited for specified parts of said indebtedness, were considered as greatly in excess of the amount due.

It is also true that the said Geo. M. Bain, Jr., was on said day indebted to said bank, on his individual account, for three notes endorsed by Bain & Bro., of which he was sole maker, amounting to $31,000 (the same hereinbefore mentioned), and for an overdraft of $5,823.09, or thereabouts, the exact amount of which these defendants cannot here state, but this indebtedness is secured, and intended to be secured, under the deed of April 6th, 1885, as well as an overdraft of Mrs. Annie S. Hall, assumed and due and owing by the said Geo. M. Bain, Jr.; and it is also true, as the defendants believe, that the said Geo. M. Bain, Jr., is indebted to the said bank for the due bills, amounting to $35.50, mentioned in said paragraph.

It is also true, as stated in said paragraph, that the said Geo. M. Bain, Jr., was on said date liable as endorser on the notes of G. A. G. Scott and S. S. Nottingham, respectively, mentioned and set forth in said paragraph of said bill, but the makers of said notes, which had not fallen due on April 2nd, 1885, are fully able and competent to protect them; and it is also true, as stated in said paragraph, that the said Geo. M. Bain, Jr., was the endorser on a note of James G. Bain for $3,000.

And it is also true, as stated in said fourth paragraph, that the said Geo. M. Bain, Jr., is an endorser on the note of $28,589.73 mentioned therein, but it is not true, as insinuated in said paragraph, that the said Geo. M. Bain, Jr., is the sole endorser on said note; on

the contrary, as was well known to the plaintiff, the said note is made by the Norfolk & Ouray Mining Company, and the said Geo. M. Bain, Jr., is one of six or more endorsers, and, so far as these defendants are informed and believe, the other endorsers (excluding John B. Whitehead, who was one of them) are perfectly able to pay said note.

It is also true, as stated in the fifth paragraph of said bill, that the said James G. Bain was, on the second day of April, 1885, liable to the said bank as maker of the note of $3,000 therein mentioned.

It is also true, as stated in the sixth paragraph of said bill, that among the notes held by the said bank on which Bain & Bro. were endorsers, and which were discounted by them at said bank, were the notes of Wallace & Son and Geo. T. Wallace (endorsed by John G. Wallace) mentioned in said paragraph, and that said Geo. T. Wallace and John G. Wallace, parties doing business under the name and style of Wallace & Son, had for some time prior to said 2nd day of April, 1885, done business as customers with said Bain & Bro.; but it is not true that by means of the endorsements of said firm the said Geo. M. Bain, Jr., as cashier, and R. T. K. Bain and James G. Bain, as directors, allowed the said firm of Bain & Bro. to obtain large sums of money by the discount of said notes; so far from it, these defendants considered the said Wallace & Son, and especially Geo. T. Wallace of that firm, as very wealthy, and as the owners of large real and personal estate: they had known them for
60 many years, and that they were as enterprising as any men who ever lived in this community, and regarded them as responsible, and these defendants were surprised when, after they closed their doors on April 2nd, 1885, and the said Wallace & Son came to surrender all their effects, real and personal, to them, to learn and find that their assets were so small compared to what their credit had been, for, besides the said notes held by the said bank, these defendants had given said Wallace & Son almost unlimited credit, and they then owed them considerably over $300,000.

And it is not true that, as a part and parcel of a scheme of fraud and conspiracy, as charged in said sixth paragraph of said bill, the said Bain & Bro., on the same day of the execution by them of the said deed of trust in the bill mentioned, caused or procured to be made and executed to themselves the deed of bargain and sale by the said George T. Wallace and wife, and John G. Wallace and wife, in said paragraph mentioned and set forth, and that said deed was antedated for any such fraudulent purpose. Said charge is utterly false.

Nor is it true, as charged in said paragraph, that, as a part of any fraudulent scheme and design against the said bank, on the sixth day of April, 1885, at the dwelling-house of the said R. T. K. Bain, the said Bain & Bro. caused to be executed the deed to the Richmond Cedar Works, Limited, therein mentioned and set forth. Said charge is utterly false.

It is true that the property conveyed by the said two deeds includes all the property of the said Wallace & Son, individually or as partners, except as therein stated.

And it is true that at the time said deeds were made, as these defendants believe, the said Wallace & Son were liable as endorsers on the several notes of the said Richmond Cedar Works, Limited, mentioned in said paragraph, which were held by the said Exchange National Bank.

But it is not true, but utterly false, that the said Bain & Bro. accepted and received from the said Wallace & Son the deed aforesaid of April 6th, 1885, with intent to hinder, delay, and defraud the said bank of the debt due and owing to it by Wallace & Son, and that in pursuance of such or any fraudulent intent they immediately reconveyed the same property to the trustees in said trust deed of April 6th, 1885.

And it is not true, as charged, that the said Bain & Bro. at the time of making said deed owned one-fifth of the Richmond Cedar Works. The allegation of the bill to that effect is false and is contradicted by another part of the bill itself, wherein it appears that by the paper writing of March 31st, 1885, the said Bain & Bro. conveyed all their interest in the Richmond Cedar Works to the said Exchange National Bank.

These defendants further say it is not true, as charged in the said sixth paragraph, that the said George M. Bain, Jr., as cashier, and R. T. K. Bain and James G. Bain, as directors of said bank, and as partners composing the firm of Bain & Bro., or in any other way, wilfully, fraudulently, or unlawfully conspired together to obtain, or that they did obtain, the moneys of the said bank as a loan to them without any security to the said bank therefor. Said charge is utterly false. It is true that these defendants did incur lia-
61 bilities to the said bank largely exceeding in amount one-tenth of the capital stock of said bank; but these defendants do not admit that they incurred liabilities to it in violation of section 5200 of the Revised Statutes of the United States, and if such liabilities were incurred in violation of said section 5200 these defendants are advised that the only penalty therefor is that which is prescribed by section 5239 of said Revised Statutes.

These defendents say it is not true, as charged in the said paragraph, that the said George M. Bain, Jr., as the cashier of said bank, wilfully and fraudulently permitted the aforesaid loans mentioned and referred to in said paragraph to be made to his said firm in furtherance of a conspiracy to defraud the said bank, or that any loans were made by it without security or upon insufficient security, in furtherance of such conspiracy, or with any such motive or for any such reason.

It is true, as stated in the sixth paragraph of said bill, that on or about the 10th day of March, 1885, an application was made by the said bank for a renewal of its charter; and that, after an examination of its affairs thereupon following, the said bank was required to increase its solvent assets and securities so as to bring its reserve fund up to the amount required by law.

And it is true also that the said bank and its officers made efforts to comply with this requirement, and the said Bain & Bro. were required to reduce their said liabilities to the said bank and to de-

posit securities therefor; and that, in obedience to this demand, on the 31st day of March, 1885, the paper writing which is copied in said bill and hereinafter more fully explained was executed and delivered to the said bank, and the securities therein mentioned were turned over to the said bank, viz:

Seaboard Cotton Compress stock	$300,000
Meherrin Valley R. R. bonds	200,000
Southern Telegraph Co. bonds, of the par value of $140,000, which were taken by the bank at	70,000
The whole aggregating	$570,000

And, in addition, the said Bain & Bro. also assigned to the said bank all its right, title, and interest in the Richmond Cedar Works, and also in and to the sum of $80,000 of Southern Telegraph Co. bonds, held by them as collateral security. The above securities at the time of the said transfer were either then actually in the hands of the said bank or were considered as in its hands as collaterals for the indebtedness of Bain & Bro. to said bank, and the said transfer was only turning over absolutely to said bank, for the purpose aforesaid, what it already actually or potentially had.

These defendants deny the allegation of the bill that at the time of the said transfer the said securities (with the probable exception of the Seaboard Compress Company's stock) were not worth near fifty per cent. of their face value, and that these defendants knew that the corporations whose stocks were thus pledged (with the exception aforesaid) were insolvent, and especially if such a charge implies that these defendants had any knowledge about the
62 matter which they withheld; and in regard to said stocks and their value, these defendants are well aware that it has been the policy of the plaintiff and those who are acting with him, but from what motive has not been disclosed to these defendants, to depreciate the value of the said securities and the solvency of the said corporations, whereas the facts in regard to them are as follows:

The Seaboard Cotton Compress Co. is a corporation owning large and valuable warehouses and the lands upon which they stand necessary for their profitable use, with wharves and docks attached thereto, large and improved cotton presses in the best running order, and valuable tugs, barges, &c., all of which were used most profitably in the compressing, storing, and shipping of cotton and the storage of other merchandise. It was a great enterprise and was under the best management possible, and these defendants do not think they overestimate it when they say, as they believe, that their interest therein represented by the $300,000 worth of stock cost them nearer $400,000 than the face value of their stock. Such an enterprise was essential to the great cotton trade of Norfolk, which was fostered in every way possible by the said bank, and by its accommodation to the cotton merchants, buyers and sellers, which it never refused, if possible. The said company paid large dividends to its stock-

holders, besides affording to the public indispensable facilities, made so by the large receipts and shipments of cotton at this port.

The Meherrin Valley railroad is a branch road running from Margarettsville, in North Carolina, to Hicksford, in the county of Greensville, Va., is about twenty miles long and laid with steel rails, and the said bonds constituting its whole indebtedness, and representing $10,000 only per mile (its cost under economical and favorable circumstances), were secured by a deed of trust upon the said road and all its running stock, appurtenances, etc. Their value was then and is now believed to be more than fifty per cent. of their face value.

And the Southern telegraph bonds, which were taken at only fifty per cent. of their face value were then in the hands of the said bank, or so considered, and though their market value was believed at the time of said transfer to be less than what the said bank took them at, yet this fact was as well known to the said bank as to these defendants, and it was believed that in the suit then pending in this court to subject the property of the said Southern Telegraph Co. to the payment of said bonds very nearly if not fully fifty per cent. would be realized therefrom. None of the facts were withheld by these defendants from the said bank.

It is not true, as charged in said paragraph, that upon the delivery to the said bank of the said securities and of the writing aforesaid, the said Bain & Bro. were wrongfully and unlawfully permitted by the said Geo. M. Bain, Jr., cashier, to withdraw from said bank the twelve notes of Bain & Bro., aggregating $300,000; on the contrary, upon the transfer of the securities aforesaid, which were purchesed as aforesaid, the said Bain & Bro. were entitled to said notes as a part of the consideration of said transfer, and they were therefore delivered to these defendants by Mr. Toomer, the assistant cashier of said bank, by the direction of its president and under the advice of its counsel. Any other course would have been a wrong upon these defendants.

63 It is not true that the said firm of Bain & Bro. were stockholders in said bank, as charged in the seventh paragraph of said bill, to the extent of 1,410 shares of the stock.

It is true that the said Bain & Bro. and the individual members thereof were stockholders in said bank, as follows:

Bain & Bro.	582 shares.
Geo. M. Bain, Jr.	232 "
James G. Bain	91 "
R. T. K. Bain	91 "
Geo. M. Bain, Jr. (one-half of Whitehead & Bain)	50 "
Total	1,046 shares.

To which, if there be added the stock of Thos. A. Bain, deceased, 91 shares, the whole number will be 1,137 shares. And it is true that these defendants are liable to be assessed for the shares which they held, according to the provisions of section 5151 of the Revised Statutes of the United States. And it is true that notices of an as-

sessment under the said section have been served on these defendants by mail, but for what number of shares, as specified in said notices, these defendants do not now remember. The said notices were received in the latter part of April, and required one-half of said assessment to be paid on May 18th and the remaining half on June 17th, 1885.

It is not true, as charged in the said seventh paragraph of the said bill, that the said George M. Bain, Jr., R. T. K. Bain, and Jas. G. Bain, as individuals and partners composing the firm of Bain & Bro., and as cashier and directors respectively in said bank, or either of them, wrongfully, unlawfully, or fraudulently conspired together to execute a fraudulent deed of trust to John T. Griffin, John B. Jenkins, and Wm. W. Old with the intent to delay, hinder, or defraud the said bank of and from the recovery of the sums of money due by them and each of them to the said bank, or with intent to delay, hinder, or defraud the said bank or the plaintiff as receiver thereof from the said debt and liability thereto as stockholders, and in fraud of sections 5151 and 5234 of the Revised Statutes of the United States. Said charge is utterly false.

It is true, as charged in the said paragraph, that the said George M. Bain, Jr., R. T. K. Bain, and James G. Bain, composing the firm of Bain & Bro., had in—possession considerable property, both social assets and individual property, consisting of moneys, negotiable securities, notes, bills, bonds, and other evidences of debt, and that they were seized of real estate in their names and occupancy, but it is not true that the said real estate, as charged, was purchased either chiefly or at all with any moneys which the said firm had wrongfully and fraudulently obtained from time to time from the said bank, nor that any such moneys were so wrongfully and fraudulently obtained, as implied by said charge.

Nor is it true, as charged, that these defendants, being possessed of said property, real and personal, did, on the 6th day of April, 1885, with the intent to hinder, delay, or defraud the said bank, execute the said deed bearing said date, a copy of which is
64 filed as "Exhibit A" with the bill, and cause the same to be recorded as charged, conveying the property therein described and for the purpose therein provided. Said charge is utterly false.

It is true, as charged in said paragraph, that these defendants, individually and as composing the firm of Bain & Bro., were insolvent at the time of the making of said deed and owed debts largely in excess of their assets, and that they now have no other property, real or personal, against which the plaintiff can proceed at law to enforce the payment of the debts due by them to said bank; but it is not true, as charged, that these defendants, on the one side, and the trustees in the said deed, on the other, or any or either of them, with the intent and in pursuance of any unlawful and inequitable conspiracy and design as charged, or for any other unlawful or improper purpose, entered into the said conveyance of all said assets and property with intent to delay, hinder, and defraud the said bank of and from the debts due to it by these defendants, or to pre-

vent the plaintiff from the recovery of said debts. Said charge is utterly false.

Nor is it true that the said deed is fraudulent and void because it is voluntary and not upon consideration deemed valuable in law, or because there is not a sufficient designation of the property thereby conveyed.

These defendants allege that the debts secured by the said deed are all *bona fide* debts and property embraced under and secured by the said deed, and they refer to the answer of the said trustees in this cause, and especially pages 6, 7, and 8 thereof, showing in detail the consideration of those debts which are not upon their face (as appearing from the deed) the debts of the grantors, and these defendants adopt the said answer in respect to the matter aforesaid as a part of this their answer.

And, further answering, these defendants say it is not true, as charged in said paragraph, that as a part of any inequitable and fraudulent scheme on the part of Bain & Bro., these defendants closed the doors of their banking-house in Portsmouth, Va., on the 2nd day of April, 1885. Such a course was the only one left open to them after their insolvency. Nor is it true, as charged, that these defendants, upon closing their said doors, proceeded to execute the said deed of April 6, 1885, to carry out any fraudulent intent on their part, or on the part of either of them, for none such existed or ever had existence in their minds.

These defendants believe it to be true, as charged, that the said John T. Griffin, John B. Jenkins, and Wm. W. Old, the trustees in said deed, had notice of the suspension of the said firm of Bain & Bro. at the time of the making of said deed, and also of its insolvency and of its indebtedness in a general way to the said bank; but it is not true that the said trustees, or either of them, had any knowledge or notice of any intent on the part of Bain & Bro. or of these defendants, or of either of them, to hinder, delay, or defraud the said bank of and from recovering the said indebtedness to it, for no such intent existed, as before stated. Said charge, therefore, is utterly false. And it may be proper to here *to* state that the said John B. Jenkins was not in either the city of Norfolk or Portsmouth at the time the said deed was made, and neither he nor the said John T. Griffin knew anything about said deed or that they were trustees therein until after it was executed; and in regard
65 to the specific charge affecting the said W. W. Old in the said paragraph, these defendants say that while it is true that the said W. W. Old had been the counsel of these defendants for many years past, in special cases in which they needed counsel, he was never their counsel or legal adviser in any of their affairs with the said bank, and they have no reason to believe and do not believe that he had any knowledge of their said affairs with said bank up to the said 2nd day of April, 1885. When these defendants found it necessary to close the doors of their banking house they sent for the said Wm. W. Old, who was then in Princess Anne county attending court, and retained him as their counsel, and as such he advised them in the crisis then upon them upon all such matters as were

submitted to him. These defendants' wishes in regard to an assignment were made known to their said counsel and he advised them that they had the right in conveying all their property and assets, real and personal, to make such disposition thereof among their *bona fide* creditors as should seem to them best and most proper, and under such advice, which these defendants are advised is in full accord with their legal rights, these defendants made the deed aforesaid; and while these defendants do not understand it to be the office of the court to inquire into the motives which impelled them to make the disposition of their said property provided for in the said deed, yet these defendants do not hesitate to say that they aimed to do the fullest justice then in their power to their *bona fide* creditors by first surrendering all they had, procuring the relinquishment by their wives of their dower in all their real estate, and then so distributing their property and assets that their depositors in their banking house in Portsmouth, to whom these defendants owed about $900,000, and who had a claim on them which was of the most meritorious character, should, after taking into consideration what the said bank had already received of the assets of these defendants, turned over to them under the circumstances aforesaid, and what the said bank would receive under the said deed for the claims therein secured to it, receive an equal and just proportion of the said property and assets of these defendants; and to this end all the energy and will of these defendants were in that trying time called into action. And upon the maturest reflection and with a knowledge of their assets and indebtedness these defendants believe they have dealt, as nearly as possible, justly in the distribution they have made.

So that these defendants deny and say it is not true that the said Wm. W. Old was from April 2nd to April 6th, 1885, present daily with them aiding, advising, and preparing the said deed of trust as a consummation of any fraudulent intent on the part of these defendants, or of either of them, or that he, the said Wm. W. Old, aided in the consummation of any such fraudulent intent by drawing, executing, acknowledging, and recording said deed, for, as before stated, no such intent had then or ever had any existence. Said charge is utterly false.

These defendants deny that the said deed of trust is on its face fraudulent, null, and void, for the reasons charged in the eighth paragraph of said bill, or for any other reasons. In respect to the said reasons, these defendants refer to the answer of the trustees in said deed on this point and adopt the same as a part of this an-
66 swer, in response to the said allegations. In the execution of the said deed of trust these defendants not only thought it due to their creditors thereby secured to convey all their property for the use and benefit of their said creditors, but to give the trustees such power as to the sale thereof as to make the property most available and the trust most beneficial to those secured by the said deed, and also to put the creditors thereby secured upon the best possible footing. No other object or motive existed in the minds of these defendants, and no other object or motive can be in-

ferred by the most strained construction from the terms of the deed itself; and these defendants are not advised that any creditor other than the plaintiff has ever made any objection either to the powers vested thereby in the trustees or to the terms and conditions thereof; and these defendants believe that the objection to the said deed made by the said plaintiff proceeds only from a scheme entered into by him of wholly setting aside the said deed, and thereby gaining a preference over all other creditors, or, in other words, appropriating the whole assets.

It is true, as stated in the ninth paragraph of said bill, that the said trustees named in said deed have taken possession of all the assets and property, real, personal, and mixed, social and individual, of these defendants, and that without any such exception as stated in said paragraph. These defendants have been permitted by the said trustees to remain in the dwelling-houses formerly owned and occupied by them, respectively, as a shelter for themselves and their respective families, but it is only by such permission that said dwellings are so occupied. And the defendant, R. T. K. Bain, has given such assistance without fee or reward, however, to the said trustees touching the books and unsettled accounts of Bain & Bro. (with which he was more familiar than any other person living) as he was called on to give or as he thought proper.

Many of the accounts and transactions upon the books of Bain & Bro., or found among their assets, show they are in an unsettled condition, as was to be expected in such a case; and the said defendant has felt it due to himself and to the creditors of Bain & Bro., in whom he has not lost interest, though ruined himself, to explain these matters to the trustees in order that they might be able to make the most of them and do justice to the parties concerned therein. To have done less than this these defendants feel that the said R. T. K. Bain would have stopped short of his full duty in doing justice to their said creditors.

And these defendants, proceeding to answer the interrogatories propounded to them by the said bill, do answer as follows:

To the 1st interrogatory: This interrogatory has been already fully answered in the body of the answer.

To the 2nd interrogatory: For an answer to this interrogatory these defendants refer to the inventory filed by the trustees in this cause as well as to their answer to the fourth interrogatory hereinafter following.

To the 3d interrogatory: The moneys for which Bain & Bro. are indebted to the Exchange National Bank and coming to them went into their general business.

R. T. K. Bain owes no individual debt to said bank.

67 As to Geo. M. Bain's, Jr., indebtedness, the moneys for which John B. Whitehead and Geo. M. Bain, Jr., are indebted were used mainly in the purchase of stocks, all of which the bank holds as collateral security. These stocks, when purchased, were considered, all of them, as highly desirable investments; and some of them were purchased and held for the further reason that it was greatly to the benefit of Norfolk and its trade that Norfolk should

have a voice in these corporations whenever occasion required in opposing unjust discriminations against this port. Since the purchase of the stock in the Norfolk & Western Railroad Co. (which represents the collateral for the largest debt, to wit, $79,550) there have been times when said stock could have been sold for nearly double what said debt now is; but from faith in the road and its connections, and the feeling that it was highly desirable and necessary that Norfolk should have a representation in a corporation of such vital importance to it, the said Whitehead and Bain have continued to hold the said stock for the benefit of the commercial interests of Norfolk, but to their own detriment, as it has proved. The said Geo. M. Bain, Jr., believes the said stock to be valuable, though at present depressed by the prevailing business stagnation, from which every industry is suffering. The balance of the said joint indebtedness of Whitehead and Bain was used mainly in the purchase of other stocks and bonds which were also pledged as collaterals and which are in the hands of the receiver. As to the indebtedness of $36,860.09 by Geo. M. Bain, Jr., he says that it was used in various ways, and for purchases which he is not able at this time to designate in full; part of it was for the purchase of 450 shares of the Norfolk & Ouray Mining Co. stock, and part for 625 shares of the Chesapeake & Idaho Mining Co. stock. The said Geo. M. Bain, Jr., in incurring said debts, regarded his own individual property as a security for them; and he caused said indebtedness, as well as an overdraft of Mrs. Annie S. Hall, assumed by him and due and owing by him, to be secured in the first class in the said deed of trust (the said deed conveying all of his individual property); and thus the said indebtedness was fully provided for, and the payment thereof rendered certain. As to the indebtedness of $34,738.73 referred to in the bill for which the said Geo. M. Bain, Jr., was an endorser, he says that $28,598.73 thereof is represented by a note of the Norfolk and Ouray Mining Co., upon which there are some six or eight endorsers, most of them men of the highest credit and standing, and several of whom are abundantly able of their individual means to pay the whole debt; besides, the said note is secured by deed of trust on property of many times its value. For some reason unknown to the said Geo. M. Bain, Jr., the plaintiff, in his bill, has not seen fit to disclose any of the facts as to this indebtedness, but from his representation of it it might naturally be inferred that the said Geo. M. Bain, Jr., was the sole endorser upon this note, and that it was worthless. The said Geo. M. Bain, Jr., believes that the money obtained from this note was expended for machinery and improvements for the said mining company. The note of G. A. G. Scott for $140 was endorsed by the said Geo. M. Bain, Jr., to aid the said Scott, who is an industrious, reliable mechanic, in carrying on his business. It is a good debt.

68 The note of S. S. Nottingham for $3,000, endorsed by the said Geo. M. Bain, Jr., is a perfectly good debt, and will be paid in full by the maker.

As to the note of James G. Bain for $3,000, endorsed by the said Geo. M. Bain, Jr., the said James G. Bain answers that the money

therefrom was expended partly for household furniture and effects and partly to pay other indebtedness of his, including certain liabilities of his father-in-law, which he assumed because of his indebtedness to him.

As to the few due bills referred to in said bill these defendants cannot now say how the small amounts represented by them were expended. It is probable that the due bill of Bain & Bro. for $192 was for the use of R. T. K. Bain or of his son. Said due bills should have been sent in and collected, but for some oversight it was not done.

To the 4th interrogatory: The real and personal property of R. T. K. Bain was as follows:

His residence in Norfolk county	$10,000
Furniture and effects in same	2,238
House and lot on Court street, Portsmouth, occupied by N. E. White	2,000
House and lot on Court and North streets, Portsmouth, occupied by W. E. Judkins	4,000
Double tenement and lot on Court street, occupied by George R. Atkinson, Jr., and George Watts	1,100
House and lot on Green street, between Glascow and North streets	750
House and lot in Norfolk county, adjoining R. T. K. Bain's residence, occupied by N. Richardson	3,000
One-seventh interest in real estate left by his father, Geo. M. Bain, deceased, in Portsmouth	1,043
Total	$24,131

The above valuation of the real estate is according to the assessment of the same, but it is believed that said property is worth at least $30,000.

The real and personal property of Geo. M. Bain, Jr., was as follows:

His residence corner North and Washington streets	$6,200 00
Furniture and effects in same	1,618 75
House and lot on Court St., occupied by Dr. Parrish	3,800 00
House and lot on High street, between Court and Dinwiddie	5,000 00
Lot on High street, near post office, in name of R. T. K. Bain	2,000 00
Lot in Newtown, formerly owned by F. Ferebee and George M. Bain, Jr.	100 00
Undivided half interest in ½ square near Gosport bridge, between South and Crabb streets	1,200 00
Three lots on Glascow street extended, and near Chestnut, in Norfolk county	250 00
Lot in Norfolk county, near Gosport, known as Meigs' lot	300 00
One-seventh interest in real estate left by his father, Geo. M. Bain, deceased, in Portsmouth	1,043 00
Total	$21,511 75

69 It is believed that the above property is worth about $30,000, the valuation of the real estate given being based upon the assessment.

The bonds and securities of Geo. M. Bain, Jr., are not given, because they are held by the Exchange National Bank as collateral security.

The real and personal property of Jas. G. Bain was as follows:

His residence and lot attached, on corner Washington and Glascow streets	$5,050 00
Furniture and effects in same	1,931 25
Undivided half interest in five lots in Newtown, owned by Geo. L. Neville and Jas. G. Bain	100 00
One-seventh interest in real estate left by his father, Geo. M. Bain, deceased, in Portsmouth	1,043 00
Total	$8,124 25

It is believed that said property is worth about $10,000, the valuation of the real estate given being based upon the assessment.

To the 5th interrogatory:

All the real estate, whether standing in the name of Bain & Bro. or of any of the firm, except that set out in the answer to the last interrogatory as belonging to the members of the firm individually, belonged to the firm of Bain & Bro. The inventory, therefore, will show, or enable it to be ascertained, in detail what the firm real estate was. It would be useless labor to set it out again here. The firm real estate was purchased out of the firm moneys. It came out of the general business.

To the 6th interrogatory:

The 2nd paragraph of the said bill furnishes the information called for by this interrogatory, and said paragraph is admitted to be true in the body of this answer, so far as it relates to the subject-matter of this interrogatory. The exact number of years during which R. T. K. Bain or James G. Bain were directors of the Exchange National Bank they do not recollect, but believe the records of the bank will show.

To the 7th interrogatory:

This interrogatory is answered in detal in the body of this answer.

To the 8th interrogatory:

The consideration of $151,800 named in the deed of Geo. T. Wallace and John G. Wallace, dated the 4th day of April, 1885, was not paid in cash, but said sum represented a part, but not one-half, of the indebtedness of Wallace & Son to Bain & Bro., and said sum, with the two liens on the property, amounting to about $12,000, and for which the property was responsible and which it would have to pay, was the estimate made by Wallace & Son at the time of making the deed of about what the property was worth. It was also stipulated at that time that the claims of the employees and laborers of Wallace & Son and Geo. T. Wallace should be paid by the grantees as a part of the consideration of the deed.

It was considered important that such should be done as well in the interest of the grantees and of the trust, subject as shown
70 in the answer of the trustees, as in the interest of the grantors, and because required by them.

Only one of the two liens above referred to on the property is mentioned in the deed, and that is referred to therein because the property reserved to Mrs. Julia M. Wallace was exonerated from it, and it was sought to make the property conveyed by the deed expressly subject to it, while there was no question of its being alone expressly subject to the other lien.

And now, having fully answered, these defendants pray, &c.

ROB'T T. K. BAIN.
GEO. M. BAIN, JR.
J. G. BAIN.

STATE OF VIRGINIA, }
City of Portsmouth, } *To wit:*

This day personally appeared before me R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain and made oath that the matters and things contained in the foregoing answer, so far as stated of their own knowledge, are true, and so far as stated upon knowledge or information derived from others they believe to be true. Given under my hand and seal this 30th day of June, 1885.

[SEAL.] WM. G. MAUPIN, Jr.,
Notary Public.

71 And, further answering, these defendants say in reply to the 2nd paragraph of the said amended bill that the items of indebtedness surrendered to Bain & Bro. by the Exchange National Bank on the execution of the agreement and transfer of Mar. 31st, 1885, are correctly set out in said amended bill, but these defendants again expressly and positively deny that Bain & Bro. were wrongfully and fraudulently permitted by Geo. M. Bain, Jr., cashier, to withdraw from said bank the said items of indebtedness. On the contrary, on the execution of the said agreement and transfer by Bain & Bro. the said items of indebtedness were surrendered to them by the direction of the president of the said bank under the advice of its counsel. Such was the intent of the said agreement and of the said transaction. And the value of the securities referred to in said amended bill was as well known to the said bank and its counsel as to these defendants, and nothing was withheld by these defendants from the said bank. Any insinuation or charge to the contrary in the said amended bill, or of any fraud on the part of these defendants in connection with the said transaction, is false.

In regard to the other interests referred to as assigned under
72 the said agreement, the same were assigned rather as security for the guarantee made of any deficiency resulting from the realization of the before-mentioned securities, and the said agreement so shows, and the transaction was so understood, and it was only the interest of the said Bain & Bro. which was so assigned; but these defendants deny that the said Richmond Cedar Works

was at the time insolvent, or that they knew such to be the case. The said allegation is untrue.

The amount of stock held in the said bank by Bain & Bro. and the individual members of said firm, as set out in the said amended bill, correcting the erroneous statement thereof made in the original bill, is taken from the answer of these defendants to the said original bill, and is correct, except that in the enumeration and addition thereof the whole of the 100 shares of stock held jointly by Geo. M. Bain, Jr., and John B. Whitehead are included, making the aggregate erroneous to the extent of the 50 shares belonging to the said John B. Whitehead.

73 And these defendants, in reply to the 3rd paragraph of the said amended bill, deny the charge therein contained that a large and valuable part of the personal and real estate of Bain & Bro. and of the individual members of said firm was purchased with the moneys of the exchange National Bank of Norfolk, which the said R. T. K. Bain, Geo. M. Bain, Jr., and Jas. G. Bain, while occupying the position of cashier and directors of the said bank, and as such sustaining fiduciary relations to said bank, had fraudulently misappropriated to their own use. Said charge is false. And these defendants deny that any property, real or personal, was so purchased by them, or that any moneys of the said bank were fraudulently misappropriated by them.

And these defendants, further answering, in reply to the allegation that the trustees, under the deed of assignment of Bain & Bro., had refused to allow the plaintiff access to the books and papers of Bain & Bro., since the institution of this suit, upon the request of the plaintiff in writing for leave to examine the same, say

74 that the said trustees did so refuse, and that thereupon motion was made to this court by the said plaintiff for an order allowing him or his counsel to inspect the said books and papers, which motion was duly argued and considered and was overruled and refused by the court.

These defendants deny the right of the said plaintiff and his counsel to inspect said books and papers; they say that such claim on their part is wholly unknown, either to chancery or common-law practice, and is opposed to the well-recognized principles prevailing in said courts. They admit that said books and papers, for proper cause shown, may be called for and produced before a master of this court, as provided for by the 77th rule of practice, laid down by the Supreme Court of the United States for courts of equity, but they wholly deny any such right of inspection as claimed by the plaintiff or his counsel.

And these defendants, in reply to the 4th paragraph of said amended bill, deny that the said deed of assignment made by them was made with intent to hinder, delay, and defraud the said

75 bank and its receiver of and from recovering the said indebtedness to it, or with any fraudulent intent or purpose whatsoever, actual or constructive; and they therefore deny that the trustees under said deed had notice, legal or otherwise, of fraudulent intent on the part of said defendants.

And now, having fully answered, these defendands pray, &c.

ROB. T. K. BAIN.
GEO. M. BAIN, JR.
J. G. BAIN.

JAMES ALFRED JONES.
LEGH R. PAGE.
RICHARD WALKE,
P. D.

STATE OF VIRGINIA, *City of Portsmouth,* } *To wit:*

This day personally appeared before me R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain and made oath that the matters and things contained in the foregoing answer, so far as stated of their own knowledge are true, and so far as stated upon knowledge or information derived from others they believe [them] to be true.

Given under my hand and seal this first day of September, 1885.

[Seal W. G. Maupin, Jr., Notary Public, Portsmouth, Va.]

WM. G. MAUPIN,
Notary Public.

76 And on another day, to wit, on the — day of September, A. D. 1885, the defendants, Geo. T. Wallace and John G. Wallace, filed their joint and several answer to the amended bill in this cause, which said answer is in the words and figures following, to wit:

77 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Va.,

vs.

BAIN & BRO. and Others.

The joint and several answer of Geo. T. Wallace and John G. Wallace, individually and as partners trading under the name and style of Wallace & Son, to the amended bill filed against them and others in the above-entitled cause by the said Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va.

These defendants, reserving to themselves all benefit or advantage of exception or otherwise to the said amended bill on account of its many errors, both of law and fact, and of its other imperfections, for answer thereto, or to so much thereof as they are advised it is material or proper for them to answer, answering, say:

These defendants refer to and adopt their answer to the said original bill heretofore filed in this cause as and for their answer to the said amended bill, the said amended bill stating nothing by way of amendment affecting these defendants or calling for or requiring further answer from them.

Their answer to the said original bill is in the words and figures following, to wit:

78 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Va.,

vs.

BAIN & BRO. and Others.

The joint and several answer of Geo. T. Wallace and John G. Wallace, individually and as partners trading under the name and style of Wallace & Son, to the bill of complaint exhibited against them and others by Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va.

These defendants, reserving unto themselves all benefit or advantage of exception or otherwise to the said bill on account of its many errors, both of law and fact, and of its other imperfections, for answer thereto or unto so much and such parts thereof as they are advised it is necessary or material for them to make answer to, answering, say:

These defendants admit that among their indebtedness to Bain & Bro. were included the several notes referred to in the 6th paragraph of said bill, aggregating $105,000, to wit, the five notes for $16,000 each of Wallace & Son and the two notes made by Geo. T. Wallace and endorsed by J. G. Wallace, one for $10,000 and the other for $15,000; and they also admit that they are merchants, lumber-getters, and farmers, and have had many business transactions and borrowed much money from the said Bain & Bro., but they deny the allegations of the bill in the above regards,

79 except in so far as above admitted; and they specially deny as wholly false the allegation of the bill that "by means of the endorsement of Bain & Bro. they were permitted and allowed by the said Geo. M. Bain, Jr., cashier, and R. T. K. Bain and James G. Bain, directors, to obtain large sums of money by the discount of their said notes at the said bank, amounting together to the sum of $105,000, or more, without any security therefor." On the contrary these defendants allege that the said notes were discounted for them by the said Bain & Bro., and were afterwards rediscounted by the Exchange National Bank for the said Bain & Bro.

These defendants, further answering, deny any and every allegation and charge of fraud and conspiracy contained in the said bill in respect to or in connection with their deed to the said Bain & Bro., a copy of which is filed with the said bill as "Exhibit No. 1;" they deny that the said Bain & Bro. caused the same to be made, or that the same was made, as part and parcel of any scheme of fraud and conspiracy, as charged, or that it was antedated for any fraudulent or wrongful purpose whatever; it was not antedated at all, being dated on the day of the understanding in regard thereto, and on which it was commenced to be written.

The consideration of the said deed was something more than that

expressed therein; besides the $151,800 mentioned there were two liens on the property, amounting to about $12,000, which were to be assumed and paid out of the property by the grantees, and these defendants also stipulated and required that the said grantees should pay off and discharge the amounts due to the employes and laborers of Wallace & Son and George T. Wallace. This was considered by these defendants as but just to that class of persons, who were dependent, most of them, upon their wages for actual sub-
80 sistence, and who, if discharged unpaid, would suffer serious deprivation, and might be led into the commission of depredations upon the property or other excesses. The above was the consideration of the said deed, and the motive prompting these defendants to the same was to apply their assets, as far as they would go, to the payment *pro tanto* of their large indebtedness to Bain & Bro.

And these defendants, further answering, deny any and every allegation and charge of fraud contained in the said bill in respect to or in connection with the deed from them to the Richmond Cedar Works, a copy of which is filed with the said bill as "Exhibit No. 2." The consideration expressed in this deed is $55,000, of which $31,885.71 is expressed as being paid in cash, that being the amount of a deposit of the said Richmond Cedar — with the said Bain & Bro., which was thereby in effect paid to the said Richmond Cedar Works, and the balance of the consideration of $55,000, to wit, $23,114.29, being evidenced by four notes of the said Richmond Cedar Works mentioned in said deed, which four notes passed under the deed made by these defendants to the said Bain & Bro. The effect of the said deed to the Richmond Cedar Works was greatly to benefit the Exchange National Bank, said bank holding a large interest in said works acquired from Bain & Bro. on the 31st day of March, 1885, as shown by the said bill, and being also a large creditor of said works. Besides the amount for which the Richmond Cedar Works was in effect by said deed preferred and paid, to wit, $31,885.71, the property conveyed by said deed was necessary to said works for its supply of timber and for its well-being and prosperity. The aforesaid estimates of the value of the properties conveyed by the two deeds before mentioned were made by these defendants
81 as being about their real value, and at least equal to said value, and the aggregate amount thereof was much less than the indebtedness of these defendants to the said Bain & Bro.

And these defendants, further answering, again deny any and every allegation, charge, or insinuation of fraud against them, or either of them, contained in the said bill, either in respect to the matters aforesaid or in respect to any other matters whatsoever.

And now, having fully answered the said bill in so far as the same pertains to them or calls for or requires answer from them, these defendants pray to be hence dismissed with their reasonable costs in this behalf expended; and they will ever pray, &c.

GEO. T. WALLACE.
JOHN G. WALLACE.

UNITED STATES OF AMERICA.

EASTERN DISTRICT OF VIRGINIA, *County of Norfolk,* } *To wit:*

This day personally appeared before me George T. Wallace and John G. Wallace, and made oath that the matters and things contained in the foregoing answer, so far as stated of their own knowledge, are true, and so far as stated upon knowledge and information derived from others they believe to be true.

Given under my hand and seal this 3rd day of July, A. D., 1885.

[Seal J. J. Warren, Notary Public.]

JOHN J. WARREN, *N. P.*

82 And now, having fully answered, these defendants pray &c., &c.

GEO. T. WALLACE.
JNO. G. WALLACE.

JAMES ALFRED JONES,
LEGH R. PAGE,
RICHARD WALKE,
p. d.

STATE OF VIRGINIA, *City of Portsmouth,* } *To wit:*

This day personally appeared before me John G. Wallace, and made oath that the matters and things contained in the foregoing answers, so far as stated of his own knowledge, are true, and so far as stated upon knowledge and information derived from others he believes to be true.

Given under my hand and seal this 3rd day of September, 1885.

[Seal W. G. Maupin, Jr., Notary Public, Portsmouth, Va.]

WM. G. MAUPIN, JR.,
Notary Public.

83 And on another day, to wit, the — day of September, A. D. 1885, the said plaintiff filed his replication to the joint and several answer of William W. Old, John T. Griffin, and John B. Jenkins, trustees, &c., to the amended bill in this cause; and on the same day the said plaintiff also filed his replication to the joint and several answer of R. T. K. Bain, George M. Bain, Jr., and James G. Bain to the amended bill in this cause, which said replications are in the words and figures following, to wit:

84 In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk, Plaintiff,

vs.

BAIN & BRO., WM. W. OLD, JOHN T. GRIFFIN, and JOHN B. JENKINS, Trustees, *et als.*, Defendants.

The replication of William H. Peters, receiver of the Exchange National Bank of Norfolk, plaintiff, to the joint and several answer of William W. Old, John T. Griffin, and John B. Jenkins, trustees, defendants, to the amended bill in the above-entitled cause.

This repliant, saving and reserving unto himself, now and at all times hereafter, all manner of benefit and advantage of exception which may be had or taken to the many insufficiencies of the said answer, for replication thereto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law
85 to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

WM. H. PETERS,
Receiver of Exchange National Bank of Norfolk.
By T. S. GARNETT,
His Counsel.

Endorsed: Norfolk, Va., Oct'r 5, '85. I hereby acknowledge service of a true copy of within. Richard Walke, of counsel for trustees.

86 In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk, Plaintiff,

vs.

BAIN & BRO., W. W. OLD, JOHN T. GRIFFIN, and JOHN B. JENKINS, Trustees *et als.*, Defendants.

The replication of William H. Peters, receiver of the Exchange National Bank of Norfolk, plaintiff, to the joint and several answer of R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain, as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners, doing business under the firm name and style of Bain & Bro., and also as individual defendants to the amended bill in the above-entitled cause.

This repliant, saving and reserving unto himself, now and at all times hereafter, all manner and benefit of advantage of exception

bers of said firm or either of them, with books of accounts appertaining to the affairs of either of them, from the Exchange National Bank of Norfolk and at what time or times, and under what circumstances and upon what securities said moneys or funds of said bank with which said property or any part thereof may have been so purchased or acquired were obtained, and what securities said parties respectively held to said bank at the time or times said funds or moneys were obtained.

And in aid of said inquiry the defendants, John T. Griffin, William W. Old and John B. Jenkins, and all other defendants in this cause are required to produce before said master all the books of account and papers of the said firms of R. T. & Bro. or of the individual members of said firms or of either of them which are in the possession or under the control of the said persons, or of any of either of the defendants, to be subject under the supervision of said master to the inspection and examination of the plaintiff and his counsel, with the aid of an expert accountant, if desired by the plaintiff, the said examination to be made in connection with the books of the Exchange National Bank of Norfolk and by the said master reported to the court. And leave is hereby given to the parties hereto to examine on oath before said master any other party or parties as to any matter or matters pertinent to this suit, and to take before said master the depositions of witnesses touching said matters to be used as evidence before him and on the hearing of this cause.

Norfolk, Va., 11th November 1885.

96–871 And on the 10th day of April, 1886, Charles T. Barry, special master, filed his report in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Virginia, Plaintiff.

vs.

R. T. K. BAIN, GEO. M. BAIN, JR., and JAMES G. BAIN, Survivors of Themselves and Thomas A. Bain, Deceased, late Bankers and Partners under the Firm Name and Style of Bain & Bro., and John T. Griffin, Wm. W. Old, and John B. Jenkins, Trustees under a Deed dated April 6th, 1885, and Others, Defendants.

The undersigned, Chas. T. Barry, special master appointed by an order of this honorable court, entered in the above-entitled cause on the 11th day of November, 1885, a copy whereof is hereto annexed, would respectfully report that he has made due inquiry into the matters referred to him by the said decree, in the execution whereof he has been engaged from the 16th day of December, 1885, at divers times until the tenth day of April, 1886, with the following result:

I. The matters referred to the master under said order for inquiry and report are as follows:

A. What property, real and personal, is embraced in the deed of trust of April 6th, 1885, filed as Exhibit A with the plaintiff's original bill, and the value thereof.

B. With what funds the same was purchased, and especially what por-

tions, if any, of said property, real or personal, were purchased or acquired by either of the firms of Bain & Bro., or by any or either of the individual members of said firms, or either of them, with funds or money obtained by them or by any or either of them from the Exchange National Bank of Norfolk.

C. At what time or times and under what circumstances and upon what securities said moneys or funds of said bank with which said property or any part thereof may have been so purchased or acquired were obtained.

D. What relations said parties respectively held to said bank at the time or times said funds or moneys were obtained.

Testimony upon these several matters was adduced before me, as well as upon the matters at issue in the cause, all of which is herewith returned by direction of counsel for the respective parties, to be read upon the hearing.

Before stating the details which go to make up the findings upon these matters in the order above named, I would report

First: The official and fiduciary relations respectively held by the individual partners of the firm of Bain & Bro. to the Exchange National Bank.

The Exchange National Bank was organized in the year 1865, and in September of that year the firm of Bain & Bro. was established as bankers and brokers in the City of Portsmouth, Virginia, by the two brothers R. T. K. Bain and James G. Bain. The capital stock of the said firm was assumed to be the sum of five thousand ($5,000) dollars, being in shape of the amounts placed on the books to the credit of the two partners on commencing business; it was not carried as a stock account, nor was it ever increased during the existence of the firm. Geo. M. Bain, Jr. joined his brothers as a partner and was admitted into the firm soon after the commencement, and Thos. A. Bain became a partner in 1868 or 1869, but neither of the new members then or at any other time contributed any money to the capital stock though each partner held a one fourth interest in the business.

On the 7th of July, 1870, Bain & Bros. became stockholders of the Exchange National Bank.

On the 8th of July, 1870, Geo. M. Bain, Jr. was elected cashier of said bank and continued as such until the 2nd day of April, 1885.

On January 2nd, 1872, R. T. K. Bain was elected a director of said bank and served as such until April 2nd, 1885.

On August 12th, 1873, Jas. G. Bain was elected assistant cashier and he was elected a director of said bank on January 11th, 1881, and on the

next day was elected vice-president thereof and served as such until April 2nd, 1885.

Thomas A. Bain the elder died in 1877. He had been a director from the 11th day of January, 1876.

The shares of capital stock of the said bank held by the said Bain & Bro. and each member thereof, though all deemed by them as firm property, at the time of the suspension of the bank, are as follows:

Bain & Bro., 582 shares; R. T. K. Bain, 91 shares; Jas G. Bain, 91 shares; Geo. M. Bain, Jr., 92 shares; Thomas A. Bain's estate 91 shares; Geo. M. Bain, Jr., as per stock ledger of the bank, 140 shares; Geo. M. Bain, Jr., jointly with John B. Whitehead, 100 shares. Total, 1187 shares.

The Exchange National Bank and the banking house of Bain & Bro. closed their doors at the same hour about ten thirty A.M. on Thursday the 2nd April, 1885.

The following named witnesses have been examined before me and their depositions are herewith returned.

B. U. Keyser, bank examiner; R. T. K. Bain, defendant; Geo M. Bain, Jr., defendant; Jas. G. Bain, defendant; Wm. G. Maupin, bookkeeper of Bain & Bro.; Geo. R. Atkinson, bookkeeper of Bain & Bro.; Alfred P. Thom, attorney at Law; H. D. Bulkley, expert accountant; M. T. Dill; C. T. Phillips, clerk Hustings Court; H. S. Herman, late bookkeeper Exchange National Bank; R. H. Wright, late bookkeeper Exchange National Bank; James H. Toomer, late assistant cashier Exchange National Bank, and the plaintiff, all of whom were summoned at the instance of the plaintiff; and the following summoned by the defendants' counsel:

Wm. W. Old, Trustee, John T. Griffin, Trustee and John B. Jenkins, Trustee,

Under the following circumstances.

On the 16th December, 1885, after due notice to the parties pursuant to the order of court of Nov. 11th, 1885, the examination of the books of account and papers mentioned therein was commenced at the late banking house of Bain & Brother in Portsmouth. A preliminary inspection was made and certain of the books of Bain & Brother were selected, and the same were produced on the 18th December, 1885, at my office in the U. S. Court rooms at Norfolk.

Here for some days the inspection of the books was made with the aid B. U. Keyser, Bank Examiner, and after sundry adjournments, the said Examiner gave before me his deposition which is herewith filed.

The condition of the books of Bain & Brother and the manner in which they had been kept was such as to render very tedious and difficult the task of ascertaining from them any information whatever concerning the matters in reference; and the very fact that during the major part of six weeks, R. T. K. Bain was on the witness stand being examined as to transactions of his firm and his Bank which should have been clearly and definitely set forth by the books of his firm and Bank, show how inaccurate and unreliable their system of bookkeeping was.

The testimony of the Examiner, B. U Keyser as well as my own inspection of the books, established the fact at once that the system of bookkeeping as practice by Bain & Brother was of themost unusual and extraordinary character. The defendant R. T. K. Bain testified that it was "to have an account of the debits and credits and to confine it to as few books as possible." They were not kept in what I am informed is "a regular banking form." See Q. 14, R. T. K. Bain's deposition : and Q. 100, 105 Id.

As illustrating the impossibility of estimating even approximately the amount and character of Bain & Bro's assets, I find that the Cash tickler L. of Bain & Bro., contains an item calling for cash balance on hand as of April 2nd. 1885, $555,273.58. Of this amount there was in actual money turned over to the trustees the sum of $14,125.26. (See dep. of W W. Old, Q. 38.)

In answer to question 524 R. T. K. Bain says that his balance was "chiefly composed of amount paid for real estate improvements, amounts "paid for the purchase of real estate and stocks, amounts paid for various "expenses, paid in merchandising and our farming business, amounts paid "for material and labor in building the wharf and improvements that now "compose part of the property of the Seaboard "Cotton Compress Co." "and "amounts drawn by the several members of the firm from time to "time."

These items were so carried as cash for years. See deposition of W. G. Maupin, Jr., late boookkeeper for Bain & Bro. Q. 9 and answer thereto.

H. D. Bulkley, expert accountant, examined some of the bundles of papers containing part of these various disbursements, and found them to be of a miscellaneous character, chiefly for farming expenses, and in his answer to question 41 as to his opinion of that mode of carrying a daily cash balance, says:

"I must confess that in all my varied experience as an accountant I have never met with anything equal to it, and it presents the anomalous condition of affairs that the more a man spends the greater his assets appear, and I can see no reason to justify any such course of procedure."

There were no general ledger accounts, nor even the usual accounts kept by ordinary business establishments. There was no ledger account kept by Bain & Bro. of their transactions with the Exchange National Bank, with whom by far the greater part of all their dealings was conducted. I have to report that the account of Bain & Bro. with that bank was kept only in lead pencil, on their stub books (the pass books and return checks were in ink), and having ascertained this, it was not surprising to find that said account is altogether unreliable, having been kept by them in the loosest and most irregular manner, and apparently without regard for accuracy.

(See deposition R. T. K. Bain, Q. 24 and 25.)

Immense sums of money have been drawn from the Bank by Bain & Bro. at short and frequent intervals by checks which nowhere appear as having been taken from the stub books and no account thereof taken on said books.

The stub book balances are therefore mere sets of figures, carried forward without meaning and giving no clue to the actual state of their account at the bank. The pass books were presumed, from their being posted up at the said bank, to exhibit the true condition of the account. But it is proven that even these pass books are incorrectly kept.

Large sums at many different dates appear as deposits on the stub books without ever having been entered on the pass books, and vice versa. The conclusion is that their account with the Exchange National Bank was not correctly kept on either their pass books or stub books, and they continued in this uncertain and unreliable state until the end, and so remain to this date.

(See deposition R. T. K. Bain, Q. 64, 69, 126, &c.)

On the 8th February, 1886, the defendant, R. T. K. Bain, was summoned to testify as to the matters of reference and as a witness in the cause. His deposition, taken from day to day, continued until the 16th March, 1886, and is very voluminous. Much time was unnecessarily consumed by the hesitation and delay of the witness in answering interrogatories, but from his testimony chiefly, taken in connection with the deposition of H. D. Bulkley, the expert accountant, I have ascertained the circumstances under which the moneys of the bank were obtained by Bain & Bro.

But before stating these facts, it is proper to report here—

Secondly. What property, real and personal, is embraced in the deed of trust of April 6th, 1885?

The description of the property of Bain & Bro. set out in the deed itself conveys no clear idea whatever of the estate affected thereby, but mentions it in general terms as being "all the property of every kind whatsoever,

real, personal and mixed, wherever situated or found, of the late firm of Bain & Bro., of the present firm of Bain & Bro., and of the individual members of the firm of Bain & Bro."

And the only evidence adduced by either plaintiff or defendant as to the various pieces of real and personal estate owned by the said firm or firms, or the members thereof, is found in the inventory filed by the trustees, Messrs. Old, Griffin and Jenkins, who have also testified as to the value of the trust subject.

From a list of deeds for real estate filed as an exhibit by W. W. Old with his deposition, Q. 28, it appears that the following were the purchases of real estate by Bain & Bro., and the cost thereof, at the different prices given below:

From 1865 to 1870	$ 36,085 33
From 1871 to 1877	42,038 50
From 1878 to 1884	63,254 20
Total	$141,378 03

The real estate so purchased is situated for the most part in the city of Portsmouth and the county of Norfolk, and includes all such estate firm and individual. The trustees assess the value thereof as follows, to wit:

Real estate in Portsmouth		$133,425 00
Real estate in Norfolk county and adjoining counties		55,951 75
They estimate the value of all the property, real and personal, in the deed of Wallace & Son to Bain & Bro., taken April 6th, 1885, (consideration $151,800) at less than		100,000 00
The list of notes and overdrafts given at pp. 84-85 of the trustees' inventory, aggregating $334,-270.22, is valued by their testimony at		85,000 00
By personal estate (valuation) on Bain & Bro.'s farms		22,061 90
Personal estate of George M. Bain, Jr	$1,618 75	
Personal estate of James G. Bain	1,931 25	
Personal estate of R. T. K. Bain	2,238 00—	5,788 00
Bank furniture, vessel property and Portsmouth Times (newspaper)		3,143 25
Stocks and bonds, p. 83 inventory		14,000 00
		$419,369 90

The Special Master finds this as the estimated value of the estate, but cannot rely upon the figures given, as there is no way to ascertain the offsets and reductions which are stated as existing to the various items given in the list of notes and overdrafts filed by the trustees. The two items therein numbered 7 and 9 aggregating $200,510.13 being estimated as worth about $20,000.

Mr. Old, Trustee, estimates the total estate worth from $400,000 to $500,000. Mr. Griffin, trustee, estimates it at about $425,000. Mr. Jenkins, trustee, says it is worth at a rough estimate $450,000.

As to all which property I am required to report—

Thirdly. With what funds the same was purchased and especially what portions, if any, of said property, real or personal, were purchased or acquired by the defendants Bain & Bro. or either of them with funds or moneys obtained by them or either of them from the Exchange National Bank.

The difficulty of ascertaining any facts in regard to this matter is apparent from a glance at the mode of keeping the accounts between Bain & Bro. and the bank, no record except the stub books and return checks, as before stated, being kept of the transactions either in real or personal estate. Deeds for the real estate of the firm were nearly always taken in the name of R. T. K. Bain, and it is here noted that information touching nearly all the investments of the firm is derivable not from the books of Bain & Bro., but from the memory alone of R. T. K. Bain, in whose name the great bulk of the assets stand and by whom they were controlled. In nearly every instance, stocks and other securities, though issued to an individual member are said by him to belong to the firm.

The other partners, Geo. M. Bain, Jr. and Jas. G. Bain, testify that they knew nothing about the investments of the firm, and Geo. M. Bain, Jr. says he had not seen the books of his firm for fifteen years. According to his testimony he was cashier of the Exchange National Bank from July 8th, 1870, until its close, and paid little or no attention to his firm's business after he became cashier, but retained his one fourth interest therein.

Thomas A. Bain departed this life in 1877, but his estate appears to have remained equally interested in the business.

Jas. G. Bain testifies to his very limited knowledge of the affairs of the firm; knows nothing of its investments, and is not familiar with its accounts.

Robert T. K. Bain was the most active business man of the firm and of all its affairs, as conducted at their banking house in the City of Portsmouth, which consisted of banking business, brick yard and lime factory,

supplies for buildings, merchandise, and the conduct of several farms, including the purchase and sale of guano and fertilizers.

See Q. 137 and 232 deposition of R. T. K. Bain.

There being no capital stock account kept, nor any investment thereof shown on the books, I find that in a very few years their individual accounts instead of keeping the assumed capital ($5,000) intact, showed increasing debit balances against each one of the partners, until at the failure their several accounts stood as follows:

DEBIT BALANCES.

James G. Bain	$54,796 73
R. T. K. Bain	47,369 23
George M. Bain, Jr.	7,146 39
Thomas A. Bain's estate	20,028 41
Total	$120,340 76

See R. T. K. Bain's deposition, Q. 149 and 153.

During the whole period of their existence Bain & Bro. were constantly in advance to the firm of Wallace & Son with whom their dealings seem to have been conducted on terms altogether unusual. They were at all times indebted by overdrafts on Bain & Bro. ranging from $100,000 to $300,000 carried for them without interest, since 1877, and without any security other than that R. T. K. Bain said they had security "on what they owned," but no lien on their property, or any collateral security of any sort was taken.

Wallace & Son had "unlimited credit" with Bain & Bro., and whenever Bain & Bro wanted money they got it from the Exchange National Bank. (R. T. K. Bain's deposition, Q. 507-509.) The investments made by Wallace & Son in real estate were therefore considered by R. T. K. Bain as belonging to Bain & Bro. No other member of the firm had any knowledge in regard thereto.

The debt of Wallace & Son is, as shown by R. T. K. Bain, now due to Bain & Bro. after all credits $91,161.49, (see his deposition Q. 358) though from the evidence of the trustee, Mr. W. W. Old, there seems to have been an understanding at the taking of the Wallace deed that their whole debt being then over $300,000, should be "wiped out" by that transaction. See deposition of W. W. Old, Q. 21 and answer thereto.

That the funds of the Exchange National Bank, obtained by Bain & Bro., went to aid the business of Wallace & Son, there is no sort of doubt. Geo. M. Bain, Jr. says "some of it" probably so went.

The trust subject is largely composed of this property but the inven-

tory makes no appraisement of it, nor have I any means of ascertaining the value of the real estate conveyed by Wallace & Son. But I find conclusive evidence of the purchase by Bain & Bro. and the individuals composing that firm, with funds obtained from the Exchange National Bank, while they were respectively occupying the official relations to said bank above mentioned, of the following parcels of real and personal estate, now in the hands of the trustees and claimed by them, the dates of purchase and the amounts set opposite as follows:

REAL ESTATE.

Inventory No. 22, bought May, 1876	$ 650 00
" " 50, " September, 1881	500 00
" " 58, " April, 1884	1,137 45
" Nos. 65, 66 and 67, bought August, 1881, and October, 1882, $768.34, $1,865.16	2,633 50

COLORADO MINES.

"Boomerang," bought August 30, '84	16,333 00
"Laura Dunmore," bought August 4, '84	5,000 00
	$ 26,253 95

PERSONALTY.

Dismal Swamp Canal bond, bought December, 1880	2,100 00
Seaboard and R. R. R. Co.'s stock, 1 share, bought about '79	90 00
Ocean View R. R. and Hotel Co.'s stock, 122 shares, bought October, 1880	6,100 00
Chesapeake and Idaho Gold and Silver Mining Co.'s stock, 625 shares, bought after 1881, date not given	7,812 50
Guano "ex Mt. Edgecomb," paid for by Exchange National Bank Feb. 15, 1884, $59,725.97—part thereof on hand April 6th, 1885, and other part in open accounts due for sales thereof, amount now traced	15,034 51
Norfolk and Ouray Mining Co.'s stock, 6,114 shares, whereof the trustees hold 3,602 shares, the purchase price being $25 per share	90,050 00
Personal estate of James G. Bain	1,931 25
	$149,372 21

A similar purchase of guano to that mentioned above was made with the funds of the Exchange National Bank on the 18th day of January, 1881, being cargo per bark "James Bain," and the sum of $50,511.70 of

the bank's funds were used to make the purchase, the draft therefor being treated in the same manner as that for the cargo "Mt. Edgecomb."

The facts as to the purchases mentioned above were elicited chiefly from the memory of R. T. K. Bain, except in the case of purchase of guano "ex Mount Edgecomb" and per "James Bain."

That purchase of Mt. Edgecomb guano was made on the 15th February, 1884. A draft for $59,225.97 was drawn on Bain & Bro. by Robert Norman & Co., New York, for this cargo. It came to the Bank of Portsmouth for collection, and was paid for Bain & Bro. by the Exchange National Bank, and from that date was carried at said bank in the receiving teller's cash as a cash item, without charging any interest thereon, until January 20th, 1885, when it was retired by proceeds of discounts of $200,000 of Bain & Bro.'s notes, which yet remain unpaid.

About 30 or 40 tons only of this guano remained on hand April 6th, 1885, but about $10,000 or $12,000 worth of it is represented among the open accounts reported by the trustees as among the assets of Bain & Bro.

The several pieces of real estate ascertained to have been purchased with the funds of the Exchange National Bank were pointed out by R. T. K. Bain from memory, assisted by references to the check book of Bain & Bro.

They were purchased by checks which, coming through the Norfolk Clearing House, were paid for Bain & Bro. by the Exchange National Bank and carried in the paying teller's cash, where the debit balance of Bain & Bro. was continuously large from the 18th July, 1880, up to the failure.

The interest in the Colorado mining property was purchased by George M. Bain, Jr., jointly with John B. Whitehead and W. H. Echols, the Exchange National Bank paying drafts therefor amounting to $59,000, Whitehead and Bain drawing their checks on the bank to pay the same, having no funds to their credit at the time.

(See deposition of George M. Bain, Q. 150, and answer thereto.

This is now part of their overdraft at the bank.

The investments in Norfolk and Ouray mining stocks and in Chesapeake and Idaho mining stock are partly admitted in the answer filed, and as to the other parts proved by the testimony of H. D. Bulkley.

From the condition of the books it is proper to state that no other person than R. T. K. Bain can give further information as to the funds used by him in making such purchases, and he says they are all "if he is not mistaken."

And finally I am to report—

Fourthly. At what time or times and under what circumstances and

upon what securities said moneys or funds of said Exchange National Bank, with which said property or any part thereof may have been so purchased or acquired, were obtained.

From the year 1871 up to the 1st day of April, 1885, the firm of Bain & Bro. enjoyed the unlimited use of the funds of the Exchange National Bank, being by reason of their official positions, in actual control of said bank and all its resources; George M. Bain, Jr., being cashier; R. T. K. Bain, James G. Bain and Thomas A. Bain (now deceased) directors, (the latter only about one year.)

At all times, from the year 1878 to its suspension, they were constantly indebted to the bank, both upon their own notes and the rediscounted notes of their friends and customers.

The amounts of their own notes being usually carried to the extent of from $400,000 to $800,000, and at the same time rediscounts in like large amounts were passed to their credit through cashier account.

These transactions, together with immense advances of money by the bank to Bain & Bro. by means of the ingenious fictions known as "Due bills in the Receiving and Paying Teller's Cash," steadily increased in volume until at or about the time of the failure they had reached the sum of about $1,500,000.00.

This indebtedness was carried on the books of the bank for Bain & Bro. in such manner as to render it a very difficult task to ascertain even from the said books what its amount at any given time really was. It was separated into such various forms and so shifted about from one account to another as to baffle any attempts to describe it. The books of Bain & Bro. do not disclose anything reliable concerning it and only confuse the account.

The Comptroller of the Currency by his letter of the —— of March, 1885, filed in this cause, ordered the reduction of this huge debt. Accordingly, I find that an apparent reduction was attempted on the 31st day of March, 1885. The notes of Bain & Bro. and other items as mentioned in the plaintiff's bill were then exchanged for certain stocks and bonds taken at a valuation of $570,000, but with a continuing guarantee in the agreement of March 31st, 1885, in the bill mentioned, that these securities should bring that sum whenever sold, and the said R. T. K. Bain received back their said notes representing that amount, to wit, $570,000 on that day upon his agreement with the counsel of the bank that he would make no deed giving preference against the said bank. After which the said indebtedness remained as follows:

Bain & Bro., note makers	$325,000 00
Bain & Bro., endorsers	593,251 99
Bain & Bro., notes in New York	50,000 00
Bain & Bro., cash tickets, &c	1,605 90
Bain & Bro.'s stock (Exchange National Bank), liability and each individual, including Whitehead & Bain, 1,187 shares	118,700 00
And a certain deficiency on sale of said stocks and bonds under their guarantee, which according to the only evidence before me will be about	300,000 00
Total	$1,388,557 89

Since the failure Bain & Bro. are entitled to the following credits:

Amount paid Receiver to date on notes endorsed by them	$54,314 30
Amount lost in compromise settlements of notes endorsed by them (under orders of this Court)	63,101 80
Deducting this amount	117,416 10
From $1,388,557.89, leaves	$1,271,141 79

No interest has been added on any account.

In addition to this the individual liability of Geo. M. Bain, Jr., to said bank, is, not including his joint liability on stock with John B. Whitehead, about	$205,326 52
Subject to a credit to be collected from Alex. Brown & Sons of	68,602 50
Which will leave balance of principal due by him of	$136,724 02

The circumstances under which these sums of money were obtained from the bank, and on what security, I find to be as follows:

R. T. K. Bain and Geo. M. Bain, Jr., both testify that whenever they wanted money from their general business they obtained it from the Exchange National Bank by discounting their own paper, or the paper of others endorsed by them. No record whatever of any security to the bank for such discounts can be found, and the evidence of the defendants touching this subject will be stated below.

The course of dealing between Bain & Bro. and the Exchange National Bank is shown by their own testimony, and that of H. D. Bulkley, the expert accountant. The said expert accountant during the months of June and July, 1885, made a very complete examination of the books of the Exchange National Bank and aided very materially in the examination of the books of Bain & Bro. in connection with the books of the bank.

The firm of Bain & Bro. were in the habit whenever they wanted money of issuing their own notes payable to their own order, and the same were discounted for them by Geo. M. Bain, Jr., cashier, in such amounts and at such times as suited their desires.

At first they drew these notes in sets of $5,000 each, soon increasing to $10,000 each, then $15,000, then $20,000, and finally for several years past carrying them in sums of $25,000, each, and having constantly for a a long period, more than $600,000 of such paper currently maturing. In addition thereto they re-discounted at said bank the notes of their Portsmouth and country customers, with the simple endorsement of Bain & Bro., aggregating at all times large sums, and amounting at the time of their failure to nearly $600,000.

These latter notes were large'y composed of the paper of firms and individuals with whom Bain & Bro. were directly interested or connected in business: chiefly the Greenville Land and Lumber Co., the Richmond Cedar Works, and Wallace & Son—who became insolvent at their failure. And in addition to all this Bain & Bro. had the use of immense other sums of the moneys of said Bank, without interest, and without even the security of any written acknowledgment of the same by Bain & Bro., by means of certain fictions known as "due bills in the cash." These were of two kinds:

1st. In the paying teller's cash. 2d. In the receiving teller's cash.

The meaning of these fictions is set forth in the expert's testimony briefly stated it is this.

1st. The due bill in the Paying Teller's Cash:

Bain & Bro. were not members of the Norfolk Clearing House, but their daily clearances were effected for them by the Exchange National Bank.

When the Clearing House settlements showed balances against Bain & Bro. the debit was taken up by the Exchange National Bank, and for the amount so paid by the bank a memorandum erroneously called a "due bill" was made out by the paying teller, Mr. Thomas Ott, for the cashier, and this memorandum, say "Bain & Bro., $100,000," or "Bain & Bro., $100,000," as the case might be, was put in the paying teller's cash, treated by the cashier as money, counted as cash in the bank's funds and carried without interest.

The daily balances in the Clearing House settlements alone, from January 1st, 1879, to April 1st, 1885, (6 years and 3 months) averaged $58,082.28, and it was a constant indebtedness from July 10th 1880. Deposition of H. D. Bulkley, Q. 19—"The loss of interest to the Exchange National Bank on this account at six per cent. is $21,780.86, and at nine

per cent. is $32,671.29, and there was a continuous debit balance on this account from the 13th day of July, 1880, up to the time of the failure.

When this debit reached such enormous proportions as $400,088.01, as it did on the 24th November, 1884, it was reduced by proceeds of new discounts of Bain & Bro.'s own notes—say for $200,000 or $300,000 at a time, the proceeds of which went into cashier's account, and were by him shifted to the credit of Bain & Bro.'s individual ledger account, thus making that account good for a check to reduce the "due bill" in the paying teller's cash.

2nd. The due bill in the receiving teller's cash is defined as follows:

At different times notes of Bain & Bro. falling due and unpaid, and no new discounts to take them up being made, it was the habit to treat the said notes as paid by shifting the amount thereof into the account of the receiving teller's cash, calling them cash and requiring him to carry them among his cash items as money in hand. This fiction was so often repeated that they reached after successive maturities the sum of $230,000.00 of Bain & Bro.'s past due and unpaid notes, treated as paid and called cash, the only evidence of which was the memorandum of figures made by the receiving teller among his "cash items" without even the name of Bain & Bro. appearing on his books.

The above are substantially and without other interesting details, the circumstances under which the moneys of the Bank were obtained by Bain & Bro.

It is proper to report that from the testimony of James H. Toomer, and from the minute book of the board of directors, I find that the by-laws of the bank, sec. 13, p. 11, requiring the "Exchange Committee" to be composed of the president, cashier and one director, was not faithfully observed. During the latter years of the bank this committee was composed of the president, John B. Whitehead, the cashier, Geo. M. Bain, Jr. and the assistant cashier, James H. Toomer, who was not then a director.

It is also shown that in violation of their duty, this committee made no report to the directors of the lists of paper discounted at the bank as required by said by-law.

That the directors met semi-annually for the purpose of declaring a five per cent. semi-annual dividend, and seldom met at any other period. That Geo. M. Bain, Jr. had charge of the whole matter of discounting the paper of his firm—Bain & Bro.—and that the rate of interest on such discounts ranged from nothing to six per cent., while the paper of general customers was usually discounted at nine per cent. That while he was furnishing the moneys to his firm on such terms, he testifies he never saw

the account as kept by Bain & Bro. and knew nothing of the investments made therewith by his firm.

As to the security on which these sums of money were obtained George M. Bain, Jr.. testifies that he "always had security," and in response to the inquiry to specify what security he had for these advances, says:

1. The capital stock of the bank issued to Bain & Bro. (1,137 shares, par value $100.)

2d. The stock of the Seaboard Cotton Compress Company 2,970 shares, par value $100.

3d. Bonds of the Meherrin Valley Railroad Company, face value $200,000.

4th. Bonds of the Southern Telegraph Company, face value $140,000.

1st. As to the capital stock of Bain & Bro. in the bank.

Nine hundred and forty-seven shares of said bank stock, partly endorsed in blank, were found by the receiver at the bank, 582 of which had been issued to Bain & Bro. and the remainder to the several parties as individuals. These shares of stock were not, in the opinion of the Special Master, valid legal security to the bank for the advances made to Bain & Bro., nor were they so pledged. Said shares have become a liability of Bain & Bro., and they have been duly assessed by the Comptroller for the payment of the par value thereof, and they remain indebted therefor to the receiver.

2d. The shares of stock of Bain & Bro., firm and individual, in the Seaboard Cotton Compress Company, 2,970 shares, about one-half whereof stood in the name of Bain & Bro. and the balance in their individual names.

A large part of these shares is proved to have been purchased by them with the funds of the Exchange National Bank.

(See deposition of George M. Bain, Jr., Q. 103-27.)

Mr. Bain here testifies that as to that portion of said shares bought from C. W. Grandy, say $88,000 worth, he is clear that it was purchased by check on the bank; as to the remainder he says he is not so clear, but it probably was so purchased. He says that these shares were considered as under his control at the bank from the time they were issued, the certificates bearing date respectively November 7th, 1882, for 125 shares; October 7th, 1884, for 1,100 shares, and October 8th, 1884, for 246 shares.

These certificates, with others of the individual shares, are shown to have been kept at the bank, but unendorsed by Bain & Bro. or either of them until some time after the failure of the bank, notwithstanding they are the same shares mentioned as taken by the bank under the agreement with Bain & Bro. March 31st, 1885.

3d. The Meherrin Valley Railroad Company's bonds, total issue, dated July 1st, 1884, $200,000 face value.

R. T. K. Bain testifies that in December, 1884, these bonds were being signed by John B. Whitehead, trustee, preparatory to their issue. The cashier does not know when they came to his hands, but says he considered them as subject to his control. These also are named in the agreement of March 31st, 1885.

The Southern Telegraph bonds, face value $140,000, taken in the agreement of March 31st, 1885, as worth fifty per cent., $70,000.

These were brought over from the banking house of Bain & Bro. and delivered to the cashier on March 31st, 1885.

As to both the Meherrin Valley Railroad and the Southern Telegraph bonds, I would report that they were first the property of the Greenville Land and Lumber Company. Notes of this company ($102,000) are held by the plaintiff endorsed by Bain & Bro.

George M. Bain, Jr., cashier, when interrogated as to why this paper was discounted, he having no knowledge of the affairs of said company, answered as follows:

"I built up the trade of Norfolk by making integrity of character available as capital, and I discounted that paper because I believed in the integrity of the paper." (Q. 89 and the answer thereto.)

The telegraph bonds were first pledged with Bain & Bro. as collateral for their large advances, aggregating $230,000, made to the Greenville Land and Lumber Company.

The Meherrin Valley Railroad was built by these moneys so advanced to that lumber company. (See deposition of George M. Bain, Jr., and M. T. Dill.)

The railroad bonds were to be substituted for the Telegraph bonds in the hands of Bain & Bro., but according to the testimony of M. T. Dill this was never regularly done, though it appears from R. T. K. Bain's deposition that the affairs of the Greenville Land and Lumber Company had fallen into his hands; as he expresses it, "became a part of my business."

The Southern Telegraph bonds were in the hands of Bain & Bro. and were kept by them at their banking house in Portsmouth. They were not actually delivered to the bank until the 31st of March, 1885, under the agreement of that date.

There were two lots of these bonds, one of $140,000, taken at fifty per cent. ($70,000); the other, of $80,000, were only collateral for an advance of about $5,000, that being the extent of Bain & Bro.'s interest therein, as reported by me in the suit of Mahone v. The Southern Telegraph Company.

After careful examination I find that the only actual possession by the bank of the securities mentioned in the agreement of March 31st, 1885, was obtained under that agreement.

Said stocks and bonds were not then, and are not now, worth one-half of that price.

I find that counsel for the bank, on the 31st of March, 1885, was not informed by either the cashier or R. T. K. Bain that these securities were in any way pledged with the bank as collateral.

I have therefore to report that the large indebtedness of Bain & Bro. constantly carried at said bank, was without any legal security, and if any part of the securities mentioned by Geo. M. Bain, Jr., could be considered as at any time available to the bank, it was altogether inadequate to pay the sums of money so due by Bain & Bro.

The agreement of March 31st, 1885, carried with it the absolute right to the securities therein named, the bank paying for them in the notes and other items of debt of Bain & Bro. to the extent of $570,000.00.

The stock of the Seaboard Cotton Compress Company (2970 shares par value $100) was taken at $300,000.00.

The Meherrin Valley R. R. bonds, which road had been built by Bain & Bro.'s advances to the Greenville Land and Lumber Company, at a cost of about $105,000.00, (see M. T. Dill's deposition) were taken at par—$200,000. The lot of $80,000 of Southern Telegraph bonds were collateral with Bain & Bro. for the Greenville Land and Lumber Company to the extent of $5,000.00 as heretofore reported.

The interest of Bain & Bro. in the Richmond Cedar Works is not ascertained, but estimated by what the trustees obtained for the two fifths interest therein of Wallace & Son, it should be placed at $1,250, being an undivided one fifth interest.

The amounts mentioned in the agreement of March 31st, 1885, cannot be realized for those securities, and the deficiency on the whole $570,000 is, from the best evidence before me, likely to be $300,000.

This deficiency on the sale of the said stock and bonds was provided for in the said agreement of Bain & Bro. by their written guarantee therein that the securities should bring $570,000 whenever sold by the bank.

It is also proved that R. T. K. Bain, who executed that agreement for Bain & Bro., was informed by counsel for the bank that said agreement would not be accepted unless he agreed not to make any assignment deed giving preferences against the bank. He accordingly made that promise and the agreement was delivered—thus obtaining from the bank the release of Bain & Bro.'s notes and other debts mentioned in the plaintiff's bill.

The suspensions of the Exchange National Bank and of Bain & Bro. simultaneously, were followed by a period of intense anxiety and excitement in Norfolk and Portsmouth and the surrounding country. From April 2nd to April 11th, 1885, the Exchange National Bank was in the hands of Messrs. Brown & Keyser, agents of the Comptroller of the Currency of the United States, who employed Mr. A. P. Thom, attorney, to obtain security for the bank from Bain & Bro. for their whole debt.

During part of this time Mr. Thom, as counsel for the bank, was in conference with Mr. W. W. Old, counsel for Bain & Bro. in reference to having the said promise of R. T. K. Bain faithfully observed.

The agreement of R. T. K. Bain made as aforesaid at the time of obtaining from the bank the notes aforesaid, on March 31st, 1885, was discussed between the respective counsel for some days before the assignment was made to Messrs. Old and others, trustees.

Their views as to its legal effect are immaterial and irrelevant, the agreement being proved, its legal effect, and the obligations of the parties having notice thereof are to be determined by the court.

Whatever its effect, the deed of April 6th, 1885, was made and recorded that night between ten and eleven o'clock P. M., for the reason as stated by W. W. Old, who then caused the deed to be recorded, that he wished to avoid the effect of an injunction which he learned that evening would be applied for on the part of the Exchange National Bank's depositors, to prevent its recordation.

It secures among the first-class of preferred creditors, part of the debt of Geo. M. Bain, Jr. as an individual, say, $40,000.00. In the second class are secured "all the depositors of the said firm of Bain & Bro., at their banking house in the City of Portsmouth," also, "the notes of the Greenville Land and Lumber Company aggregating $102,000.00 now held by the Exchange National Bank."

The amount due the depositors of Bain & Bro. is variously stated. R. T. K. Bain says "about $1,000,000," and then "about 900,000."

The trustees say the amount shown by the books of Bain & Bro. is about $889,000.00, exclusive of the deposit of the Richmond Cedar Works which has been paid in full, by check dated April 3rd, 1885, drawn since the failure and allowed by the trustees, after they took possession.

The actual amount of deposits for which claims have been proved before them, was stated by J. B. Jenkins, Trustee, as $650,000, and subsequently stated by him and W. W. Old, Esq., another one of the trustees, to be $770,000.00, and this latter sum I must regard as the probable amount of their liability to depositors, the books being altogether unreliable. I find that the deed provides that after the payment in full of all the claims in

the second class, "then to secure the Exchange National Bank the amount due it by the said firm or its individual members." The value of the trust subject, under its most favorable estimates, will not suffice to pay half the claims mentioned in the second class of creditors in the deed The debt due the Exchange National Bank by Bain & Bro. of about $1,000,000.00 cannot in any event be reached at all if the deed be allowed to stand as valid.

In conclusion, I find from the evidence:

FIRST. That the official and fiduciary relations of the parties defendant, to the Exchange National Bank, during all the period of time in which they were obtaining and using the funds of the said bank for their own benefit, and especially in the purchase by Bain & Bro. of the property traced into the hands of the trustees, as above specified, were as follows: Geo. M. Bain, Jr., cashier; R. T. K. Bain, director; and James G. Bain, director and vice-president; and that the evidence shows collusion between them for that purpose; the discount of Bain & Bro.'s paper being controlled by Geo. M. Bain, Jr., cashier, without the sanction of the board of directors.

SECOND. That the books and accounts of Bain & Bro. contain no account or reliable record of their transactions with the said bank, nor was there any reliable account kept by them, either of their assets or liabilities, so that the inventory of their estate, as filed by the trustees is necessarily imperfect and unreliable, both in respect of the nature and amount of their estate, and especially so as to its value.

THIRD. That the firm of Bain & Bro. were at all times, for many years, but especially since 1878, indebted to the Exchange National Bank, and that with the moneys so obtained they purchased large amounts of property, portions of which are in the hands of the trustees claimed under the deed of trust, at least to the extent of assets representing $149,372.21 as above reported. That the moneys obtained by Bain & Bro. were mingled in such manner with the other funds of the firm and the accounts of their investments and business so negligently and incorrectly kept as to render it impossible for the lack of proper records, to show what the extent of such purchases was, or what other parts of said property now remain in the hands of their trustees.

FOURTH. That the purchases of property with the funds for which they are indebted to the bank, were for their own use and benefit, and in violation of their fiduciary relations and duties as officers and directors of the Exchange National Bank, and such transactions inevitably and directly led to the destruction of the bank and the sacrifice of the interest of all its depositors. In consequence whereof and as the moving cause

thereof, the insolvency and suspension of the bank resulted, and with it the failure and assignment of Bain & Bro. to their said trustees.

The depositions, and all exhibits filed therewith, are herewith returned to be read, as agreed by counsel, upon the final hearing of this cause.

Respectfully submitted,

(Signed) CHAS. T. BARRY, *Special Master.*

APRIL 19TH, 1886.

WM. H. PETERS, Receiver, &c.

VS.

BAIN & BRO., ET ALS.

Depositions of R. T. K. Bain, George M. Bain, Jr., James G. Bain, and others taken before C. T. Barry, Special Master.

At an examination held in my office at Norfolk, Va., pursuant to the order of November 11th, 1885, wherein I was appointed a special master in the suit of Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, plaintiff, against Bain & Bro. and others, defendants, for the purpose therein set forth, I this day issued my summons at the instance of the plaintiff's counsel for the appearance of Mr. R. T. K. Bain before me to testify in the matters referred to me by said order, and upon the said summons being regularly served on the said R. T. K. Bain he appeared in his own proper person, this eighth day of February, A. D. 1886, at my said office, being in the Clerk's office of the U. S. District Court.

Present: T. S. Garnett, of counsel for plaintiff; Messrs. Walke and Jones, of counsel for the defendant trustees, and W. W. Old, one of the trustees; H. D. Bulkley, an expert accountant, for the plaintiff, and Charles T. Barry, special master.

And the said R. T. K. BAIN, having been duly sworn according to law, did depose and testify as follows, to wit:

Q. 1. State your name, age, residence and occupation.

A. Name, Robert T. K. Bain, aged 47 years, residence Norfolk county, Va., and at present no occupation.

Q. 2. During what period of time were you a member of the late firm of Bain & Bro.?

A. I was one of the founders of the firm and a member up to the time of its suspension. I think it was founded in 1865, and suspended April 2d, '85.

WM. H. PETERS, Receiver, &c.

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Present: T. S. Garnett, of counsel for plaintiff; Messrs. Walke and Jones, of counsel for the defendant trustees, and W. W. Old, one of the trustees; H. D. Bulkley, an expert accountant, for the plaintiff, and Charles T. Barry, special master.

And the said R. T. K. BAIN, having been duly sworn according to law, did depose and testify as follows, to wit:

Q. 1. State your name, age, residence and occupation.

A. Name, Robert T. K. Bain, aged 47 years, residence Norfolk county, Va., and at present no occupation.

Q. 2. During what period of time were you a member of the late firm of Bain & Bro.?

A. I was one of the founders of the firm and a member up to the time of its suspension. I think it was founded in 1865, and suspended April 2d, '85.

Q. 3. What position did you occupy with respect to the business at their late banking house in Portsmouth, Va., and are you familiar with the books of account of said firm?

A. I was a member of the firm, and, well, sir, I suppose I know something about the books.

Q. 4. How was your time employed and did you exercise general supervision of the affairs at your late banking house?

A. Well, sir, you might say that I exercised a general supervision. The business was of a various character, which required an outdoor as well as an indoor attention, which I and those connected with me tried to perform to the best of my ability.

Q. 5. Were you or not the managing partner of your firm's business in Portsmouth, and did you or not have actual control and supervision of the books of the firm kept there?

A. We had no such title as managing partner. I suppose you might say that I as much as any one had supervision of the business. We employed clerks whom we considered competent to perform the duties.

Q. 6. Did you or not have more control and supervision of the business and give more attention to it than any other member of the firm?

A. I had no more control than other members of the firm. It may possibly have received more attention from me than from the others.

Q. 7. Is it a fact that it did receive more of your attention and that you attended to the keeping of the books more than any other member of the firm?

A. Each member of the firm, with the exception of Mr. Geo. M. Bain, Jr., gave his whole time and attention to the firm. I suppose, or I think, that my brother. Captain Thomas A. Bain, up to the time of his death, performed more of the duties on the books than either member of the firm.

Q. 8. When did your brother, Thomas A. Bain, die?

A. In the latter part of 1877.

Q. 9. Who attended to the books after his death?

A. Well, sir, the various clerks in the office.

Q. 10. I mean which member of the firm?

A. I don't remember of any member of the firm doing clerical duty on the books, unless in case of absence or sickness of the clerk.

Q. 11. Did you or any member of the firm direct how the books should be kept, or did the clerks keep them to suit themselves?

A. Well, sir, I suppose the system used was made up or matured from experience by the firm, assisted by the clerks.

Q. 12. Describe the system adopted by said firm and mention what books of the firm contain a record of current transactions of the firm, and where all such books are. Answer each clause of the question separately.

A. Well, sir, I don't know that I am competent to describe it to your satisfaction, in the space of time supposed to be allotted to this answer, by words.

Q. 13. Take your time and describe it.

A. Well, sir, there is the Tickler; that is a record of the transactions. I think that contains a record of all the transactions of the bank. The books of the bank are in the hands of the trustees.

Q. 14. Is this the only description you can give of the system of book-keeping adopted by your firm?

A. Well, sir, the system of book-keeping was to have an account of the debits and credits and to confine it to as few books as possible. They were not kept in what I am informed is a regular banking form, or a regular form in use by regular chartered banks.

Q. 15. Did your system contemplate showing the exact and true nature of all transactions had by Bain & Bro. with all parties, individuals and other banks?

A. I think it showed them all; it contemplates it, and I think it shows it.

Q. 16. Are you positive that the books show this?

A. I have no reason to doubt but that they do.

Q. 17. Mention what books contain a record of current transactions?

A. I think that the "Tickler" contains a record of all the current transactions.

Q. 18. Is the book now shown. you marked "Tickler," and the other three "Ticklers" produced before the Master, the book or books which you say contain a true and correct record of the firm's transactions with individuals and banks?

A. Yes, sir; I think they are, for the period to which they refer.

(Here the special Master is requested to call for the books mentioned on page 11 of the Master's minutes in this cause.)

Q. 19. Did you keep the said books or any account in them in your own hand-writing, or make entries therein yourself; if so, what books were kept by you; describe the same fully, in any of the books produced before the Master?

A. I may have made entries in the book from time to time, but it would be almost impossible for me to designate for a period covering over twenty years without examining the books themselves.

Q. 20. You have produced before the Master in this cause the following books, to-wit: Cash books and individual ledger accounts covering the period from 1878 to April 1st, 1885, also two books of bills receivable, four cash Ticklers, marked I, J, K and L, and two ledgers, marked A, and New Ledger, marked B, from 1865 to 1885; are these all the books showing the current transactions of your firm during that period; if not, state what other books you kept and where they are?

A. Your question contains information that I was not aware of; I was not aware of having produced any books before the Master.

Q. 21. Were you not present, with your counsel, at your late banking house, in Portsmouth, Va., and did you not then and there, on the 16th day of December, 1885, designate the books of your firm which have been produced before the Master?

A. I was present, by request, at the office of the trustees of Bain & Bro., but I did not designate the books which have been produced before the Master. I was there ready to give any information, but it was not sought of me.

Q. 22. Did you not go in the vault of your late bank on that occasion

with the expert accountant, Mr. Keyser, and show him the books therein which have been produced here?

A. I did not go in the vault with the expert accountant; I did go in the vault and found who, I was informed, was the expert accountant, with one of the Ticklers of the bank; I remarked to him that I thought that was one of the books he wanted; he made no reply and took no notice of me, and I withdrew from the vault.

Q. 23. Then state if the books mentioned in question 20, which have been produced by the trustees before the Master, are all the books showing the current transactions of your firm during the period covered by them; if not, state what other books you kept and where they are?

A. All the books kept by Bain & Bro. are in the banking house of Bain & Bro., in the hands of the trustees, where we left them, except those in the hands of the Master, and those in the hands of the Master contain the transactions of the firm of Bain & Bro.

Q. 24. Have you a general ledger account of Bain & Bro. with the Exchange National Bank of Norfolk on any of your firm's books; did you keep such an account; if not, what record have you of the current transactions of your firm with said Bank?

A. No, sir; I have not; I had no general ledger account with the Exchange National Bank of Norfolk; my current transactions with the Exchange National Bank are contained in the pass books and stub check books and returned checks, in the hands of the Master.

Q. 25. Your firm's draft stub books and return checks covering the period (with slight exceptions) from December 11th, 1871, to April 2, 1885, together with the pass books used between your firm and the Exchange National Bank, have been produced and are now before the Master; is this the only way in which you kept your account with said bank, and does it cover all your firm's transactions with said bank?

A. They are the only books kept by us with said bank, I think, and I think contain all the transactions of said bank with Bain & Bro.

Q. 26. Were you in a position to know the fact you have just stated, and do you not know it?

A. I think I was in a position to know as much as any human being, and I think I know as much as anybody else about them, but there have been periods when I have been absent, which justifies me in the qualification "I think."

Q. 26. Name some period of your absence and for how long?

A. Well, sir, I don't remember exactly, but I think I was absent a part of February and March, 1884, and part of October and November, 1884; part of October, 1883, I was perhaps absent; I think I was sick and absent a part of December, 1884, and January, 1885; I think I was absent considerable previous to 1877; I don't know what year; there may be other periods that I cannot now mention.

Q. 28. Have you any book or books kept by your firm, or was any book kept by the firm showing any yearly statement of the condition of your business?

A. We kept no such book and have none.

Q. 29. Have you any or did the firm keep any statement of balance sheets or trial balances taken from your firm's books at any time; if so

produce them, especially that for December 31st, 1884.

A. The trial balance was taken off from what we term the individual ledger monthly, and there was no record of it, as it was only taken down on paper to prove the balances of the individual depositors to be correct. They were not preserved. I suppose they were destroyed.

Adjourned over till 10 A. M. February 9th, 1886.

FEB. 9TH, 1886.

Met pursuant to adjournment, and the deposition of R T. K. BAIN continued.

Q. 30. Have you any general ledger accounts, such as a general deposit account, interest account, discount account, investment account, real estate and property accounts or profit and loss accounts?

A. I am glad you asked me that question, as it gives me the opportunity of correcting what might seem to be a mistake in my answer to a previous question. I think there is a small book containing part of the information, if not all, that you ask, but the said book, I hardly think, goes much farther than the accounts mentioned above, which are found in the individual ledgers.

Q. 31. Where is that book and how is it designated?

A. It has no designation. It is a small book, and is at the office of the trustees.

Q. 32. Will you point out that book, so that the trustees may produce it to-morrow morning before the master?

A. I will endeavor so to do, sir.

Q. 33. Is this book, then, a general ledger account of the accounts named in question 30 above?

A. I think it contains what is known as general ledger accounts, but I don't know that they are designated by the names mentioned in question 30.

Q. 34. Does that book contain any record of the notes issued or made by Bain & Bro.?

A. It contains no record of them. It has what is termed a "bills payable account."

Q. 35. What books show the property investment accounts of Bain & Bro., and where are all such books?

A. The book just spoken of shows a part of it.

Q. 36. What book or books show the other part of it?

A. Some parts of the property account are contained in the books which were kept by Mr. Atkinson, that are in the hands of the Special Master, and just shown me by Mr. Bulkley, the expert, marked A and B. I don't remember that any of the other books contained any of them.

Q. 37. Have you any general account showing your firm transactions with the National Park Bank and the Hanover National Bank of New York?

A. I kept no account with the Hanover National Bank; the Park Bank account was kept on stubs in the same manner as was our account with the Exchange National

Q. 38. Do your two books of bills receivable show whether the lists of paper therein contained were ever paid or not, or when discounted, or what became of the proceeds when discounted?

A. I don't think they do. They are intended as a register of the paper.

Q. 39. Please take in your hands and examine the stub book here produced, and explain how your account with the Exchange National Bank was kept therein?

A. Well, sir, it speaks for itself. On the left of the printed margin is the account. Whenever anything was deposited it had to be added. Whenever checks were drawn they were deducted.

Q. 40. Do I understand you to say that the stub books show the correct balances, deposits being added and drafts being deducted, and the amounts carried forward on the pages opposite the printed margin as described by you?

A. Yes, sir; that's what I mean to say.

Q. 41. What was the balance to the credit of Messrs. Bain & Bro. at the Exchange National Bank on September 13th, 1884, as shown by your said stub book?

A. The balance September 13th, 1884, as shown by the stub book, appears to be a debit of $36,497.44.

Q. 42. Say whether there are any figures for that day's work indicated on the marginal page of the stub book now in your hands which show such a debit; if not, how did you arrive at that result?

A. Where the balance on the marginal page is insufficient to allow the deduction of the debits or checks, to arrive at an answer to your previous question I have had to deduct the said amount found to the credit on the marginal page as of date September 13th, 1884, from the check bearing the same date, thereby ascertaining the amount named in my previous answer.

Q. 43. This had not been done until just now by you, had it?

A. No, sir; I did it a few moments ago in answer to your question.

Q. 44. Then the stub book account as kept on the marginal page showed a credit to Bain & Bro. on September 13th, 1884, of $16,222.56; am I correct?

A. I still say that the account as kept on the stub book is correct; I have not said that the left hand marginal page showed the balances as of each day.

Q. 45. What then do you mean by the stub book account being correct; if not for the daily work, then for what time?

A. I mean to say that to get at the daily balances of the stub book it is necessary to use both sides of the stub book.

Q. 46. Question 41 repeated.

A. The balance as shown by the said stub book appears to be $36,497.44 to the debit.

Q. 47. Look on the marginal page opposite the printed page of your said stub book and say what figures there represent the balance to the

credit of Bain & Bro. on September 13th, 1884, before you placed the figures $36,497.44 on the printed margin?

A. The marginal page opposite the printed page on September 13th, 1884, indicates a credit balance of $16,222.56.

Q. 48. Please examine your said stub book and look at the work indicated for December 27, 1884, both on the blank marginal and the printed marginal pages, and say what amount of checks are there indicated as drawn on the Exchange National Bank on December 27th, 1884.

A. The amount of checks drawn on the 27th day of December, 1884, on the Exchange National Bank appears to be from the stub book the sum of $800.44.

Q. 49. If on the 27th December, 1884, a check was drawn by Bain & Bro. on the Exchange National Bank for the sum of $316.375, your stub book has no reference to it, has it?

A. You will find in an examination and reconcilement of this stub book and pass book that an allowance has been made for the said check if one of that date and amount exists.

Q. 50. Question 49 repeated?

A. The printed portion of the stub book does not appear to show such a check.

Q. 51. Does the figuring on the marginal page anywhere in the book show such a check?

A. I cannot say that a check of that amount is shown on the stub book without considerable examination, but I do say that if such a check is found among the return checks of the Exchange National Bank that due allowance has been made on the stub book for it.

Q. 52. If such a check exists where would allowance, as you term it, be made for it, and how?

A. At the reconcilement following its date.

Q. 53. When was that?

A. I cannot say, sir, without considerable clerical work and examination.

Q. 54. Please examine the paper now shown you, marked by the Master check No. 1, and say what it is?

A. It speaks for itself, "Pay to pro forma to December 19."

Q. 55. Say whether it is a check, give the date of it, the amount, drawn by whom, and on what bank?

A. It is a check by Bain & Bro, bearing date 27th of December, 1884, for $316,375, for which due allowance has been made on the stub book.

Q. 56. Examine your stub book from the date of that check up to April 2d, 1886, and say if your answer as to due allowance being made on the stub book for it is correct?

A. I think that a reconcilement of the account has been made since the date of the check referred to, in which, if I am correct, due allowance has been made for the said check; I cannot be more explicit without reconciling the account.

Q 57. Have you examined your stub book, as just now requested?

A. I have.

Q. 58. Then say whether there is on the said stub book any reference to the said check for $316,375; answer yes or no.

A, I have answered your question with regard to this check as frankly and as fully and without any reservation as the language at my command would permit; I can explain the action no more fully without being allowed to reconcile the account.

Q. 59. In your answer to question 55 you have stated, "It is a check drawn by Bain & Bro., date 27th December, for $316,375, for which due allowance has been made on the stub book;" in your answer to question 57 you say you have examined your stub book as requested; now say whether you find on the stub book in that examination any reference to the said check?

A. It will be impossible to give you the desired answer without a reconcilement of the account since the date of the said check.

Q. 60. Can you say whether it appears or does not appear from the stub book itself that such a check was ever drawn?

A. There does not appear to be any stub to represent the said check, but due allowance has been made for the said check on the stub book, provided the said stub book has been reconciled since the date of the said check.

Q. 61. Reconciled with what?

A. With the pass books of the Exchange National Bank showing the account with Bain & Bro.

Q. 62. Then if the said check does not appear on the stub book, would you say that fact would show that the stub book has not been so reconciled?

A. My impression is that the account has been reconciled since that date, but as I failed to find the reconcilement in the said stub book I prefer to satisfy myself as fully as I can before committing myself any further.

Q. 63. Now take your said stub book for that date, December 27, 1884, and say what is the balance for or against Bain & Bro. at the Exchange National Bank as shown by the account kept on the marginal page of the stub book?

A. The balance appears to be from the stub book a credit of $17,389.93.

Q. 64. Has the check for $316,375 entered into this balance?

A. I think not.

Adjourned to 10 A. M. February 10th, 1886.

FEB. 10, 1886.

Examination of R. T. K. BAIN continued.

Q. 65. Have you found the small book mentioned by you yesterday in your answer to question 30; if so, produce it before the master?

A. I have, yes, sir; and now produce it.

(Book produced and marked by master as Book O O, Feb. 10, 1886. C, T. Barry, sp'l master.)

Q. 66. What period of time does this book cover, and who made the entries therein?

A, It appears to commence on July 1st, 1869; the last writing seems to be of July 31st, 1877. It has the writing of George M. Bain, Jr., Thomas A. Bain and of R. T K. Bain.

Q. 67. Where are the books continuing with similar entries subsequent to July 31, 1877?

A. There are none that I know of.

Q. 68. Examine the check marked No. 1 by the master, and say if you know the handwriting in which the same is drawn; if so, whose handwriting is it?

A. The check appears to be in the handwriting, as far as I can see, of Geo. M. Bain, Jr., my brother.

Q. 69. Examine the stub book of Bain & Bro. at the dates mentioned below, and say if the said book contains any reference to the following checks of Bain & Bro. on the Exchange National Bank: No. 2, September 9, 1884, $50,000; No. 3, October 4, 1884, $285,000; No. 4, July 28, 1884, $205,000; No. 5, March 1, 1884, $3,386.74; No. 6, December 31, 1883, $2,910; No. 7, February 24, 1885, $61,921.47; No. 8, February 27, 1885, $125,000; No. 9, March 2, 1885, $66,850; No. 10, March 10, 1885, $11,047.94; No. 11, March 12, 1885, $35,186.07; No. 12, March 13, 1885, $43,300; No. 13, March 27, 1885, $2,179.33; No. 14, March 27, 1885, $21,602.48.

A. I see no stubs on the stub books representing the checks mentioned by you.

Q. 70. Say whether any of the said checks enter into the lead pencil account kept on the marginal page, or are carried forward in the balances thereon?

A. I think that some of them do and some of them do not.

Q. 71. Specify which of them do and which of them do not, and state whether you have carefully examined your said stub book, and how long it has taken you to make this examination from the time question 69 was propounded to you until your answer thereto?

A. If the pass books, which are in the hands of the special master as relating to this account, were submitted to me I might point out some of them; without said pass books I cannot say that I could point out any of the said amounts that enter into the marginal page or pages of the stub book. I believe that I have carefully examined the said stub book as to the several checks mentioned; at least I have tried to do so. I did not particularly note the space of time occupied by me in said examination, but I think it was at least one or two hours.

Examination adjourned to 4:30 P. M.

At 5:05 P. M. examination resumed.

Q. 72. You have not been interrogated as to the pass books yet, but only as to the stub books; now say whether the stub book anywhere refers to any of said checks mentioned in question 69; answer yes or no?

A. The stub book does not seem to show the checks in detail, but as to part of them I am satisfied that they are on the said stub book as a result.

Q. 73. Take the stub book in your hands and say whether your answer just given is true; examine it and specify where any of said checks appear in the stub book account as contained therein?

A. I cannot specify, I hardly think, where the checks alluded to appear on this subject without considerable clerical work and time.

Q. 74. Is not the stub book for the dates mentioned in question 69 now in your hands? You say you have examined it carefully; say whether or not it discloses anything about said checks?

A. As a result it will disclose as to some of those checks?

Q. 72. Again I ask you which ones of them are disclosed by the stub book; specify in detail?

A. I cannot specify them without considerable work.

Q. 70. Can you specify any one of them?

A. I cannot, sir, without considerable work.

Q. 74. If the stub book refers to any one of them, will it require more work than the use of your own eyes to discover it?

A. It will, because they are there as a result and not in detail.

Q. 75. Then do you say now that they are there as a result?

A. I say that some of them are there as a result.

Q. 76. As a result of what?

A. As a result of debits deducted from credits.

Q. 77. Show this in any instance by the stub book?

A. As before stated I cannot show them without considerable work.

Q. 78. Then how do you know that some of them are there?

A. Because I feel satisfied that the account has been reconciled since the date of some of them.

Q. 79. Have you not said in answer to question 62 that you failed to find the reconcilement on the said stub book?

A. I cannot remember, the record will speak.

Q. 80. The Master will please take the fourteen checks now marked by him from Nos. 2 to 14, both inclusive, and you are requested to examine those numbered as follows, to-wit: Nos. 2, 3, 4, 5, 6, 10, 13, and 14, and say whether you know the handwriting in which the same were drawn; if so, in whose handwriting are they?

A. They appear to be in the handwriting of my brother—George M. Bain, Jr.

Q. 81. Examine the other checks mentioned in said question, No. 69, now marked by the Master Nos. 7, 8, 9, 11, and 12, and say whether you know the handwriting, in which the same are drawn, and, if so, who drew the said checks?

A. They appear to be in the handwriting of Robert T. K. Bain.

Q. 82. Examine the stub book of Bain & Bro., now handed you, for the year 1883, and say whether it contains any reference to any of the following checks, bearing the following dates, to-wit: No. 15, July 11th, 1883, $53,888; No. 16, June 28th, 1883, $27,000; No. 17, August 1st, 1883, $117,000; No. 18, September 1st, 1883, $171,557.50; No. 19, September 19th, 1883, $75,000, and examine for the year 1884 for the following

checks, to-wit: No. 20, February 6, 1884, $160,000; No. 21, February 15, 1884, $100,000.

A. For 1883 I do not see the amounts asked about at the respective dates given, nor do I see those for 1884 at their respective dates on the stub book.

Q. 83. The Master will please take the said checks mentioned in question 82 and mark the same as follows, to-wit: 15, 16, 17, 18, 19, 20 and 21, and this being now done, you will please examine the same and say in whose handwriting the said checks are drawn, and whether any of them enter into the stub book balances or are shown on either the stubs as having been torn therefrom, or in the calculations on the margin of the page in the balances carried forward.

A. The checks appear to be drawn in the handwriting of my brother, George M. Bain, Jr.; they do not seem to have been torn from the stub books, but I am satisfied they enter into the calculations on the stub book.

Q. 84. Have you examined the stub book to see whether it is true that they enter into the calculations of balances carried forward thereon; if not, do so now, and show specifically where any of them are so entered, and say how you are satisfied that they do?

A. I have not examined it, but will now do so as requested; I cannot specify that there are any of them specifically in detail in the stub book, but I am satisfied that they are on the stub book as a result, for I am satisfied that the reconciliation of the account between Bain & Bro. and the Exchange National Bank has been made at a period late enough to include the said transactions.

Q. 85. If such a reconcilement has been made should it not appear on the stub book?

A. Not necessarily so, I think.

Q. 86. How, then, if not made on the stub book, could you carry forward your true balances on your stub book?

A. The reconciliation, as I understand it, is for the purpose of finding out the difference pro and con between the account of one bank with another. After this is correctly done such items as appear not to have been included in the accounts are debited and credited, and thus, as I understand it, the true balance is ascertained; in the matter before us these differences seem to have been added together on each side and the differences carried to the account; the absence of the reconcilement makes it, perhaps, more difficult to understand, but a reconciliation can be again made, if necessary, as the accounts of Bain & Bro. at the Exchange National Bank show fully their transactions with the said bank.

Q. 87. Say then, plainly, without reservation, evasion or argument, whether, in the search you have made through your said stub books for several hours to-day, you find on your said stub books any reconcilement account between Bain & Bro. and the said bank in which any of these checks enter?

A. I do not remember of seeing any such reconcilement.

And the further examination was here adjourned to February 11th, 1886, at 10 A. M.

CHAS. T. BARRY, *Sp'l Master.*

THURSDAY, February 11th, 1886.

Examination resumed.
Present—Same as on the 10th.

Q. 88. Having carefully examined your said stub book and taken two hours and twenty-five minutes to do so before answering question 69, say whether any "reconcilement account" appears to have been made on said stub book of your firm's transactions with the Exchange National Bank during the period embraced between January 16, 1885, and April 1st, 1885?

(NOTE TO THE MASTER—In order to speed this examination counsel for the plaintiff request that the master require the witness to answer within a reasonable time, and not to allow witness to write down, as he has done yesterday, both the question and his answer thereto before testifying.)

A. There seemed to be a reconcilement somewhere on the stub books, if I mistake not, in making my examination.

Q. 89. Please take the stub books again, examine for the periods between January 16, 1885, and April 1st, 1885, and show where this appears?

A. I was mistaken in my previous answer, as I think the phraseology will show. I did not intend to state that the reconcilement above referred to appeared between those dates in my examination of the stub books on yesterday, as I don't remember to have found any.

Q. 90. Say, then, whether any such reconcilement appears on the stub books for the period embraced between January 1, 1883, and January 16, 1885?

A. I think I saw a reconcilement on those dates on my examination yesterday.

Q. 91. Take the said stub books and show me where you found it?

A. I see what appears to be a reconcilement opposite the date on the stub book of May 21 and 25, 1883, and another appears to be opposite June 22 and 25, 1883, on said stub book.

Q. 92. Go on and specify all you find, within the period enquired of, what appear to you to be reconcilement accounts?

A. I find on the stub book what appears to be a reconcilement opposite the stub margins bearing date May 27th, 1884, and May 28, 1884; this is all I find.

Q. 93. Now say whether in those three reconcilements you have found there appears any of these checks shown you yesterday by the Master and marked by him Nos. 1 to 21, both inclusive?

A. In the reconcilement last referred to (May 27, 1884,) I find the following: Check $2,910, check $3,386.74. These two amounts seem to correspond with the amounts of the checks Nos. 5 and 6, as marked by you, the Master.

Q. 94. Are these two all you find?

A. These two amounts seem to be all I find.

Q. 95. Look on the page of your stub book opposite the date just mentioned (May 27, 1884,) at which you find what you term a reconcilement, and say what balance appeared by that at the foot of page.

A. The balance by the reconcilement appears to be at the foot of the

page opposite the said dates, $190,533.02. It does not say here whether it is debit or credit.

Q. 96. Well, what do you say it was, credit or debit?

A. It appears to be a credit balance.

Q. 97. Now look on the page next succeeding that one you have just examined and say what balance you carried forward at the top?

A. The balance carried forward on the top of the page succeeding appears to be $192,518.26.

Q. 98. Are you a practical book-keeper?

A. I am not, sir.

Q. 99. Are you able, if employed for the purpose, to open and keep correctly a set of books on the system known as double entry book-keeping?

A. I think not; I cannot say that I know fully what double entry book-keeping is.

Q. 100. Was the double entry system used by Bain & Bro. as bankers in your late business?

A. Having said in the previous answer that I did not know fully what double entry book-keeping is, I cannot say that the book-keeping of Bain & Bro. can be designated by the term "double entry system."

Q. 101. Do you know the difference between single entry book-keeping and double entry?

A. I cannot say that I do fully.

Q. 102. Without qualification or evasion, state whatever difference you do know between the two systems?

A. I am not a book-keeper, and therefore I know nothing of the various systems and terms used to designate them.

Q. 103. State, then, what you think was the system used by Bain & Bro. as bankers?

A. As I do not understand the different systems I cannot answer your question intelligently.

Q. 104. Have you an opinion on the subject; if so, state it?

A. I have none, as I do not understand the various systems.

Q. 105. In your answer to question 26 you say, "I think I was in a position to know as much as any human being, and I know as much as anybody else about them"—that is, the books; do you now say you have no opinion as to the system under which they were kept?

A. I see no reason to change my answer to the previous questions referred to.

Q. 106. Please examine the books now handed you by the Master marked by him Nos. 4 and 5, and say what they are?

A. Four appears to be Exchange National Bank in account with Bain & Bro.; five appears to be the same.

Q. 107. You say "appear to be;" say whether you know and recognize those two books, and how do you designate them?

A. I used the phraseology because it appeared in the books themselves, and thought I gave you the desired answer to your question. To the best of my knowledge and judgment they contain the account of the Exchange National Bank with Bain & Bro. for the period of their dates. I recognize them as being what is termed "pass books."

Q. 108. You are familiar with them, are you, and now identify them

as the books in almost daily use of Bain & Bro. in their late business?

A. I think I do sir.

Q. 109. Do you know you do?

A. To the best of my knowledge and belief I believe them to be the books above alluded to.

Q. 110. They are the same turned over by you to the defendant Trustees, Mess. Old, Griffin and Jenkins, are they?

A. I believe they are.

Q. 111. State what the said two books contain as records.

A. I believe they contain the account in part with Bain & Bro. and the Exchange National Bank.

Q. 112. Now examine the similar books marked 1, 2 and 3 handed you by the Master and say what they are.

A. To the best of my knowledge and judgment they are what are termed Pass Books of Bain & Bro. for a period previous to that contained in No. 4 and 5 just before mentioned.

Q. 113. What period is covered by the said five books?

A. The period covered by the said five pass books seems to be from March 19, 1877 to April 2, 1885.

Q. 114. Are the said pass books a true record of all the transactions between Bain & Bro. and the Exchange National Bank, between those dates?

A. As there has not been a final reconcilement I am not prepared to answer your question as fully as I might if the reconcilement had been made.

Q. 115. Examine the pass book No. 5, and say whether the account has not been written up therein and received by you from the Exchange National Bank with all your return checks and a balance struck as of April 2nd, 1885?

A. To the best of my knowledge the pass book has been written up since the deed, to the Trustees Mess. Old, Griffin and Jenkins.

Q. 116. Have you examined pass book No. 5 as requested, if so, say whether the balance therein stated is correct with your books.

A. I cannot say whether it is or is not without reconciling the account.

Q. 117. Then say whether you think the account is truly and correctly shown by the said pass books and if you know of any reconcilement, state why it does not appear.

A. I believe the account is correct. The reason no reconcilement appears is that none has been made.

Q. 118. Please examine your stub book for the date, October 17, 1884, and say whether you find any deposit indicated on the margin of the stub book, if so what is it?

A. On the margin of the stub book opposite the stub dated October 17, 1884, I find no deposit bearing the date indicated in your question.

Q. 119. On the marginal page of your said stub book opposite the date of Oct. 17, 1884, do you not find the following entry, to wit; "Dep. $279,-814,54?" Say what that indcates.

A. Opposite the stub date of October 17, 1884, I find the amount $279,814.54, with the designation "Dep." as mentioned. It indicates an addition of that amount to the account kept on the stub book as now being examined by me.

Q. 120. Do you mean a credit of $279,814.54 for Bain & Bro. with the Exchange National Bank.

A. Read that over again (Question re-read by Master) I mean to say that it appears from the stub book entry above mentioned that the said account was entitled to have the said amount added thereto.

Q. 121. How? As a credit or debit?

A. As a credit, I should say.

Q. 122 In whose hand writing is the word "Dep" opposite the said entry and the said figures $279,814.54?

A. The handwriting of Robert T. K. Bain.

Q. 123. What did the word "Dep" mean as used by you in your banking business?

A. It was intended to designate "deposit."

Q. 124. Now take in hand your pass books Nos. 4 and 5 and show where a deposit of $279,814.54 appears anywhere in said deposit books?

A. I have not been able to find the said amount.

Q. 125. Examine your stub book and say whether or not it indicates on marginal page for same date, to wit: October 17, 1884, a deposit of $5,708.55, which is also not borne on the deposit book and make similar search for the following amounts on the stub book not found on the deposit books, at the following dates, to wit: Jan. 20, 1885, $1,000.00; Jan. 20, 1885, $1,000.00; Jan. 20, 1885, $7,228.75; March 28, 1885, $23,000.00. If they do appear on the deposit book, specify where?

A. On the marginal pages opposite the following stub book dates, I find the following figures or amounts, viz: Oct. 17, 1884, $5,780.55; Jan. 19, 1885, $1,000.00; do. do., $7,228.75; March 28, 1885, $23,000.00. I have examined for the said amounts, as requested, for the period of time after the date of each amount respectfully and do not find the said amounts on the pass book.

Q. 126. Now examine your pass books at the following dates and for the following amounts, as entered in said pass books as deposits, to wit: Oct. 18, 1884, $41,735.95; Nov. 10, 1884, $9,256.98; Nov. 10, 1884, $65,827.68; Dec. 18, 1884, $185,475.69; Dec. 24, 1884, $73,392.36; Jan. 16, 1885, $60,746.37; Jan. 19, 1885, $4,100.15; Feb. 2, 1885, $4,100.00; Feb. 17, 1885, $4,270.14; Feb. 21, 1885, $59,993.47; Feb. 26, 1885, $97,694; Mar. 3, 1885, $65,525.83; Mar. 14, 1885, $92,898.87; Mar. 31, 1885, $8,393.89, and say whether these several amounts so entered on the pass books appear anywhere on your stub books from Oct. 18, 1884, to April 2, 1885?

(NOTE BY THE MASTER.—Witness having taken said books in hand, has been examining them for an hour, and not being ready to give his answer to the question, now at 4 P. M., the examination is adjourned to tomorrow-morning at 10 o'clock, A. M.)

FRIDAY, February 12th, 1886.

At 12 o'clock M., the Master is requested by counsel for plaintiff to note that the witness, R. T. K. Bain, left the stand on yesterday at 4

o'clock P. M., without having answered the 126th question, and was especially enjoined by the Master to appear here before him at 10 o'clock A. M., punctually, and now at 12 o'clock M. this day the said witness failing to appear and no cause being offered by him for such failure, the Master is requested to send an alias summons or such process as may legally compel his appearance, and now at this hour, 2 o'clock P. M., said summons having been issued by me and service thereof duly made as appears by the return thereon by Thos. Farren acting Deputy U. S. Marshal, and the said witness still failing to appear, the examination is adjourned to Saturday, Feb. 13th, 1886, at 10 A. M.

CHAS. T. BARRY,
Sp'l Master.

SATURDAY, February 13th, 1886, 10 A. M.

The witness R. T. K. Bain still failing to appear, this examination is adjourned to 1 o'clock P. M., this day.

On application of Mr. H. D. Bulkley, the expert in this case, the Special Master allowed him to make certain marks and signs on the stub and pass books, in pencil, for the purpose of verification of his work of examination, and also permitted him to take the pass books Nos. 1 to 5 inclusive to the Exchange National Bank for the purpose of comparing certain entries, &c.

(To all of which W. W. Old, for himself and his co-trustees, objected as soon as the same was called to his attention, and asks that his objection be noted, in the absence of his counsel.)

(To which objection counsel for the plaintiff says that the leave given by the Master to Mr. Bulkley, the expert, is reasonable and proper, indeed, is absolutely necessary in the execution of the order of Court with accuracy, economy and saving of time, and that counsel for the trustees, Messrs. Walke and Jones, have requested counsel for plaintiff to proceed with this examination to-day during their absence.)

(And a note from the witness, R. T. K. Bain, accompanied with a certificate of his physician, saying he was sick and unable to attend before the Special Master, this examination was adjourned to Monday, February 15th, 1886, at 10 A. M.

MONDAY, February 15th, 1886, 12 o'clock M.

The witness being present, the examination continued:

Answer to Question 126. The amounts do not seem to appear in detail on the stub book, but I am satisfied they enter into said account as a result.

Q. 127. If you believe this, show any indication of it?

A. On the marginal page opposite stub book date October 17, 1884, will

be found the figures 279,814.54, and again 5,780.55; these are indications to me that some of them appear as a result.

Q. 128. Specify in detail which ones are embraced in such a result?

A. As before stated, this cannot be done properly in detail without considerable work.

Q. 129. Explain how it would take considerable work; are not the stub books and pass books and return checks all here before you, and can it require more than the careful use of your own eyes over books with which you are familiar; what sort of work do you mean?

A. I mean to say that the amounts mentioned as appearing on the pass books were not put on the stub book at the time of their date, nor were the checks put on either, and when they were put on the stub book, there were several amounts as belonging to each side, namely, debit and credit, and that the one was deducted from the other, and that the difference was put on the stub book; while this prevents me from specifying in detail, as you desire, it makes no real difference that I can see in the result.

Q. 130. This answer gives the Master your theory as to the system of keeping Bain & Bro.'s account with the Exchange National Bank, it does not answer question 129; explain what difficulty you can have, after the lengthy examination you have made of your books, in saying whether or not any of the deposits entered on the pass books mentioned in question 126 enter into the stub book balances from October, 1884, to April 2d, 1885?

A. I think some of them do.

Q. 131. But you can give no reason for thinking so, can you?

A. It was usual to put them on the stub books, as I have explained above in answer to question 129.

Q. 132. Do you not observe that the dates of these deposits mentioned in question 126 are all subsequent to the entry of deposit on stub book October 17, 1884, $279,814.54; if so, how can they enter into your stub book balances?

A. I do not observe; the date where this amount appears to be in November, 1884, about the date of November 11th or 12th, although the dates of the 13th to the 17th of November, inclusive, seem to appear above the said amount.

Q. 133. Explain then how checks drawn from the 18th of October, 1884, on through the month could be properly deducted from the balance struck as shown on marginal page, opposite the date October 17, 1884, in the stub book, the said balance being $244,848.99, arrived at after the credit of $279,814.54 and $5,780.55.

A. The checks could not be deducted as of their respective dates because the amounts of which $279,814.54 and $5,780.55 are the result had not been added to the stub book at the respective dates of those amounts.

Q. 134. But does not your stub book show that after the balance was ascertained by including the two deposits borne on the stub book, but not found on the pass book, of $279,814.54 and $5,780.55, the checks from October 18, 1884, and on through the month, were deducted from that balance?

A. It seems to so appear.

Q. 135. Do you not see the fact that and know that it is so, the calculations being made in your own handwriting?

A. I am as positive about its being so as I can be of anything.

Q. 136. Who composed the firm of Bain & Bro. at its commencement and close, and state the changes in the membership and when they occurred?

A. James G. Bain and R. T. K. Bain composed the firm at first; afterward, I don't remember the date or dates, G. M. Bain, Jr., and Thomas A. Bain were admitted; the last name departed this life in the latter part of 1877, and the others were partners until the close of business.

Q. 137. Did the firm conduct any other business than banking; if so, state all such business and where the same was carried on?

A. Yes, sir; the firm conducted other business beside banking; they had a brick-yard, they manufactured lime, and furnished supplies for building generally, they had several farms and did some merchandise business, carried on in and around the city of Portsmouth and county of Norfolk.

Q. 138. Did either or any of the individual members carry on any individual business on separate account; if so, state all such business and where carried on?

A. None that I know of.

Q. 139. Did Bain & Bro. keep on their books their capital stock account; if so, show where it appears?

A. I do not think there was an account known as capital stock. There will be found on the books an account showing amounts to the credit of James G. Bain and R. T. K. Bain, a part of which was considered the capital stock.

Q. 140. Where are those accounts; please show them if in the books now before the Master?

A. I think you will find them in those ledgers. (Witness goes into room containing all the books now in possession of the Master to examine them before answering fully.) Ledger A, pages 4 and 5; Ledger C, pages 6 and 7; Ledger D, page 1.

Q. 141. Ledger A, pages 4 and 5, to which you refer, shows credit to J. G. Bain, March, 1866, of $6,783.46, and on same date to R. T. K. Bain, $7,037.96; state if these amounts respectively represent the capital of each of the then members in the firm at that time?

A. In James G. Bain's account the items for September, 1865, and of R. T. K. Bain for same period are intended to contain the capital stock of Bain & Bro.

Q. 142. What are those items in each account?

A. Monies placed there by each of the parties.

Q. 143. Aggregating how much in money?

A. $5,768.76 is the aggregate of the two amounts.

Q. 143½. Then do I understand that James G. Bain had $2,757.13 and R. T. K. Bain had $3,011.63, making together $5,768.76, the capital stock of the firm up to September 14, 1865?

A. Five thousand dollars of this was intended as the capital stock.

Q. 144. Ledger C, pages 6 and 7, to which you refer, contains the following entries, to wit: James G. Bain is credited with $14,415.10, and R.

T. K. Bain is credited with $20,150.18, as of August, 1871; say what part of these credits represented your firm's capital stock then?

A. Five thousand dollars.

Q. 145. Ledger D, page 1, to which you refer, shows on January 1, 1873, a credit to J. G. Bain of $6,352.50, and to R. T. K. Bain a credit of $14,802.50; say what part of these several amounts at that date represented your capital stock?

A. Five thousand dollars.

Q. 146. Has the amount of capital stock ever been changed; if so, how and how much?

A. It has never been changed to my knowledge.

Q. 147. Then state when Thomas A. Bain and George M. Bain, Jr., entered the firm, and how much capital did each contribute to the firm stock?

A. George M. Bain, Jr., was admitted shortly after the firm began without being required to invest any capital. I do not know when Thomas A. Bain was admitted, but I think it was about 1868 or 1869. No money was ever contributed by him.

And this examination is now adjourned over to Tuesday morning at 10 A. M., February 16, 1886.

TUESDAY, February 16, 1886, 11 A. M.

Examination continued.

Q. 148. Take the Ledgers which follow ledger D, in the order of time, and show how the accounts of James G. Bain and R. T. K. Bain, embracing the capital stock, are continued; point out the account book and page.

Ans. There seems to be no account carried forward from Ledger D.

Q. 149. Where, then are the accounts of the individuals, James G. Bain and R. T. K. Bain, please find them on the books and say what balances they show.

Ans. They will be found on Ledger B, page 40 and 95. James G. Bain shows a debtor balance $54,796.73, and R. T. K. Bain shows a debtor balance of $47,369.23

Q. 150. Is Ledger B, the new ledger? state when and by whom it was opened and written up.

Ans. Ledger B, is a new ledger sir, and is a continuation of some of the accounts of Ledger A.

I cannot say as to the date of its opening, as I do not think that all the accounts have gone forward of the previous ledger. It was kept by Geo. R. Atkinson, Jr.

Q. 151. Was this ledger B, opened and used in your daily business before April 1st, 1885, or were the entries made therein after the failure of your firm?

Ans. It was opened and used for quite a period previous to April 1st, 1885, as the postings and entries therein contained and embodied in the

other books of the bank clearly show, and was used in our daily business.

Q. 152. Please state if any entries therein were made after April 2nd, 1885, and if so, who made them.

(Here T. J. Kirkpatrick appears as counsel and was consulted by the witness before answering this question.)

A. None has been made to my knowledge since April 2d, 1885.

Q 153. Show what balances appear to the debit of George M. Bain, Jr., and the estate of Thomas A. Bain, deceased?

A. George M. Bain, Jr.'s debit balance appears to be $7,146 39; Thomas A. Bain's (deceased) debit balance appears to be $20,028.41.

Q. 154. Did the firm of Bain & Bro. make any investment in real estate?

A. Yes, sir.

Q. 155. Please say how the account of said real estate appears on your books?

A. On Ledger D will be found a real estate account; other items of real estate will, I think, be found on Ledgers A and B, Ledger D, page 8; the other accounts are in different places.

Q. 156. Show on Ledgers A and B what you mean by this; give the page and name the account?

A. It will take considerable work to answer your question specifically, but the property accounts bear such a designation as will readily distinguish them from the individual accounts, I think some of the accounts show the purchase money paid for them, while the purchase money for others will likely be found on cash books and ticklers.

Q. 157. On Ledger D, at page 8, to which you refer as a real estate account, look and say what amount of real estate assets your firm had when that account was footed up; state the amount and the date, and whether any general real estate account like that appears after that date, to wit: January 1st, 1874?

A. The amount footed up on Ledger D, page 8, headed "real estate," stands $96,982.34, as of date of January 1st, 1874; I know of no other real estate account like this on the books, except that there is in the hands of the Master a book marked O O which has a real estate item.

Q. 158. Now look at that book marked O O, at the last entries therein, to wit: July 31, 1877, and say whether the correct amount of Bain & Bro.'s real estate is there shown at that date; if so, what amount was that?

A. The amount shown on the said book, of $93,911.87, is in the main correct, to the best of my knowledge. I think the revenue of the property enters into this account, thus decreasing the amount.

Q. 159. Now say where among your accounts you show what was the amount of real estate acquired by Bain & Bro. since that date, July 31st, 1877?

A. I know of no account that shows said amount of real estate as a whole on the books; Ledgers A and B, I think, show it in detail.

Q. 160. Take Ledgers A and B, examine them carefully, and note the time you are so doing, for the period between July 31, 1877, and April 2d, 1885, and show where any and all real property accounts embracing that period disclose the prices paid for such property?

Before the witness had finished his examination of the books preparatory to answering the question 160 the hour of 3:15 P. M. arrived, and the examination was adjourned to Wednesday, February 17, 1886, at 10 A. M.

WEDNESDAY, February 17, 1886—11 A. M.

The examination continued:

A. On Ledger A, pages 28, 47, 88, 89, 249, 319, 353, 511, 557, 587; those are the pages where the accounts will be found. I don't find any on Ledger B. I think it has taken me about one hour and a half to learn this.

Q. 161. Are these all?

A. They are all that I found, sir.

Q. 162. Now say what are the prices respectively paid for the several pieces of real estate disclosed in the accounts mentioned at the pages just stated by you in your answer to question 160, and what those pieces of real estate are?

A. P. 28, Mansion House property, High street, near Court, Portsmouth, Va., $3,014.33; p. 40, Rodman property, Court and London streets, Portsmouth, Va., $1,000; p. 88, Armstrong property, marsh South street, near Middle, $2,595.52; p. 89, property in Princess Anne county, formerly belonging to G. Armstrong & Son, $361.49; p. 239, Thompson House, High and Crawford streets, $2,668.58; p. 319, Cherry property, Wythe street, $2,633.50; p. 353, Long Point marsh, $1,803.80; p. 511, Norfolk county land, Western Branch part of the land, $3,075; p. 511, sundry pieces, Western Branch part of the land, $5,368; p. 511, Norfolk county land, near Bowers' Hill, purchased of A. E. Wilroy, $1,277.55; p. 557, Edwards property, Queen street, near Effingham, Portsmouth, $1,137.45; p. 587, Wright property, Nansemond county, $1,497.97. I think this is all. Some of this may not be for the land itself.

Q. 163. These items aggregate the sum of twenty-six thousand four hundred and thirty-three dollars and twenty-one cents ($26,433.21); is this all the real estate purchased by Bain & Bro. bstween July 31, 1877, and April 2d, 1885?

A. I do not think it is; I think there is some which was purchased within the period named that is not shown by these books.

Q. 164. Then produce any other books, papers or memoranda which show the other purchases during that period, or say where such books, papers or memoranda are?

A. Purchases do not appear on the book as real estate because they are for purchases made for debts past due, which were secured by deed of trust; the entries have not been made charging the said purchases to real estate account.

Q. 165. Where do such transactions appear; are they on the books produced here; if so, specify some of them?

A. In the bills receivable; the property of John O'Connor, Jr., Wm. West and Noah Martin are some of them.

Q. 166. You are answering now from memory, are you not; take the books you refer to and show the transactions named?

A. I am answering from memory. [Here witness takes the bills receivable book and examines the same preparatory to answering the question 166?

Witness having taken two hours and forty minutes time in examining the books, and not being ready to make answer at 3 o'clock P. M., the further examination is adjourned to Thursday, February 18, 1886, at 10 A. M.

THURSDAY, February 18th, 1886, 10:30 A. M.

The examination was continued:

Present, in addition—As counsel for trustees, Legh R. Page, of Richmond.

Answer to Question 166. On Bills Receivable Book, marked D, page 75, will be found a note of Noah Martin's for $1,450, and on page 165 of Book D will be found a note of John O'Connor, Jr.'s for $10,000, then on page 20, Book Bills Receivable, marked E, will be found a note of Wm. West and wife for $200, and another for $1,000, and on page 24, same book, will be found a note of William and Elizabeth West for $200, and on page 33, same book will be found another note of William and Elizabeth West for $100; all of the above notes were secured by deed of trust and sold under said deeds of trust and purchased by Bain & Bro. and R. T. K. Bain; those in the name of R. T. K. Bain were for Bain & Bro.

Q. 167. Show where it appears that the purchases of real estate and deeds for the same taken in the name of R. T. K. Bain are for Bain & Bro.?

A. On the books of Bain & Bro. and in the answer of Geo. M. Bain, Jr., James G. Bain and Robert T. K. Bain to the bill of Wm. H. Peters, receiver, filed against them in the Circuit Court of the United States at Norfolk.

Q. 168. Show how this appears on the books?

A. Where real estate of Bain & Bro. appears on their books I think there will appear a designation to show the location of the property, and in some cases it will be found that this property stands in the name of R. T. K. Bain in the deed of purchase.

Q. 169. Take the books and show from them how the distinction between real estate purchased for Bain & Bro., but the deeds taken therefor in the name of R. T. K. Bain, and real estate purchased for yourself individually, or for either member of the firm, is made; state any one instance?

A. Where property belonging to the firm stands in the individual name of the member of the firm I think you will find the entries charging out as such made on the books of Bain & Bro., or under a separate head, as for example, see Ledger A, page 319, account headed "Cherry property;"

this piece is in the name of R. T. K. Bain; the real estate belonging to the individual members does not so appear.

Q. 170. (Question 1 by Master.) On what book of Bain & Bro. will that appear, and how?

A. On the cash book and ticklers, and charged to Bain & Bro, naming the property.

Q. 171. Suppose a judgment had been obtained against you any time prior to your assignment, what would have prevented that Cherry property from being subjected to the payment of your individual debts?

A. That is a question of law. The revenue derived from these pieces of property belonging to the firm having been credited to the said property on the books of Bain & Bro., would, it seems to me, be evidence that the said property belonged to Bain & Bro., although standing in the individual name. When property was taken in individual names, it was done for convenience, as when we desired to sell it, we did not have to run around to get the wives of the different members to sign and acknowledge the deeds.

Q. 172. Do you remember by whose check that Cherry property was paid for, if so, can you produce the check?

A. I think it was paid for by a check on Bain & Bro. payable to T. S. Garnett, Special Commissioner, signed by R. T. K. Bain.

Q. 173. Where are the books showing whence the items in the Cherry Property account, Ledger A, page 319, to wit: $768 34 and $1,865 16, are taken; please produce the same to-morrow morning?

A. In the hands of the Trustees if not with the Master.

(NOTE.—The books above referred to are not with the Master, and a written request will be given the witness asking the Trustees to send same to my office by the witness to-morrow, the 19th February, 1886.)

Q. 174. Do the books, Ledgers A and B, contain only Bain & Bro's accounts?

A. I think they do. We collected rents for my brother's widow and my brothers, and while these show amounts due by Bain & Bro. to said parties, it might be considered as not in reality Bain & Bro.'s accounts, although I think the construction would be a strained one.

Q. 175. Was there another set of Cash book or Ticklers kept from which Ledgers A and B were posted; if so, who kept the same?

A. As before stated, the day books from which entries on Ledgers A and B were made, were kept by George Atkinson, Jr.

Q. 176. And they were separate and distinct from the regular set of Cash books and Ticklers kept by Bain & Bro., were they?

A. They may have been separate, but they were not distinct, as they entered into and were a part of the Books of Bain & Bro.

Q. 177. Was there any division by rail or partition in your late bank separating the bank books proper and the clerk or clerks who kept the same, from the books Ledgers A and B and the clerk or clerks who kept them; if so, what was it?

A. There was no partition or division for any such purpose. The books of the bank proper, as you term it, and those kept by Mr. Atkinson were accessible at all times to any clerk or clerks in the office.

A. In the bills receivable; the property of John O'Connor, Jr., Wm. West and Noah Martin are some of them.

Q. 166. You are answering now from memory, are you not; take the books you refer to and show the transactions named?

A. I am answering from memory. [Here witness takes the bills receivable book and examines the same preparatory to answering the question 166?

Witness having taken two hours and forty minutes time in examining the books, and not being ready to make answer at 3 o'clock P. M., the further examination is adjourned to Thursday, February 18, 1886, at 10 A. M.

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Q. 177. Was there any division by rail or partition in your late bank separating the bank books proper and the clerk or clerks who kept the same, from the books Ledgers A and B and the clerk or clerks who kept them; if so, what was it?

A. There was no partition or division for any such purpose. The books of the bank proper, as you term it, and those kept by Mr. Atkinson were accessible at all times to any clerk or clerks in the office.

Q. 178. Were the books kept by Mr. Atkinson so kept by him at the rear of the banking room separated from the other books by an iron rail, in front of which the business of the bank proper was carried on?

A. Mr. Atkinson's department was not what might be understood as the rear of the bank building, but was adjoining what you term the bank proper. There was an open iron railing, over which a man could look, set on an open wooden rail, which separated to that extent the clerks working in either place, but the clerks occupying what you term the bank proper often used the department or space used by Mr. Atkinson and his assistants.

Q. 179. Who were all your clerks at the time of your suspension; name them, and say how long each had been with you as clerks?

A. George Wonnycott, clerk, about two or three years; Frank Wonnycott, runner, about two or three years; Dawson Maupin, clerk, about ten years or more; W. G. Maupin, Jr., teller, about 15 years or more; George R. Atkinson, Jr., book-keeper, about six years; Kenneth A. Bain was supplying the place of a clerk absent from sickness as book-keeper about five months. These, I believe, embrace them all. The absent clerk was Jas. W. Bain.

Q. 180. Were any purchases of real estate made by Bain & Bro. within the period from July 31, 1877, to April 2, 1885, which were not taken for debts past due secured by deeds of trust; if so, where can you show such purchases by the books?

A. I think there were some, and are on the books alluded to in question 173.

Q. 181. On the 31st July, 1877, you have said that Bain & Bro. had on their books real estate amounting to $93,911.87, and that those figures are mainly correct, and you have shown by your books where they bought $26,433.21 worth of real estate since that date; now say about what amount of real estate Bain & Bro. owned on the 2d day of April, 1885?

A. The deeds in the hands of the Master will, I think, answer your question. To answer your question more fully I should have to make examination of the deeds and books. Some of the property has depreciated and some appreciated.

Q. 182. Have you no estimate in your mind or memoranda in your possession to enable you to say about what amount of real estate Bain & Bro. owned at that date?

A. I cannot carry in my mind all the real estate of Bain & Bro., and as I have no memoranda I cannot give you the information sought in question 182.

Q. 183. Make an estimate?

A. It would be very difficult to approximate with any degree of certainty what the property of Bain & Bro. would sell for—would bring.

Q. 184. That is not the question; do you decline to say about what amount of real estate your firm owned then?

A. I do not wish to be understood as declining to answer any question. As you insist upon an estimate from me, I would state that I think the real estate of Bain & Bro. would bring from one hundred thousand to two hundred and fifty thousand dollars.

Q. 185. Is this as near as you can come to what it would bring; now say at what it should stand on your books as an asset?

A. That is as near as I care to venture an opinion. If the improvements which have been made to the property were added to the amounts already referred to, it would show the amounts it would call for on the books. (Witness here desires to change the last above answer as follows, to wit: "The amounts already referred to show what it should stand on the books; to this it is necessary to add the improvements to the property and make allowance for the revenue to get at the true amount.")

Q. 186. Please estimate what that true amount should be?

A. I should say as an estimate from about $175,000 to $250,000, or say about $200,000.

Q. 187. Take Ledger A and examine the accounts heretofore mentioned by you at pages 47, 89, 249, 319, 511, and say whether any revenues were derived from these several pieces of property, and if so, why the same do not appear on those several accounts?

A. On page 353, Ledger A, the revenue seems to appear. On the others they do not, for the reason, I think, that they have been carried to a rent account.

Q. 188. Then the revenues from some pieces of real estate were not credited to their several accounts, were they?

A. I think they were not.

Q. 189. In the case you have mentioned, however, on page 353 of Ledger A, Long Point marsh account, the revenues are credited in the account; why was this?

A. I know of no other reason other than these rents or revenues were collected by a party for us, and the crediting of them to the account proper showed more easily how they stood; that is where they were behind.

Q. 190. These were rents, were they not?

A. That is what we term them—revenues or rents.

Q. 191. What effect, then, did the crediting of rents on some real estate accounts and the failure to credit them on others have upon the general real estate account?

A. It would have the effect of reducing the real estate account to the extent of those amounts.

Q. 192. Would it confuse the general real estate account?

A. I cannot see that it would.

Q. 193. How could you, with such a system, ever get at a true and correct balance on real estate account for your balance sheet?

A. A balance sheet shows what the real estate stands at on the book; this is no criterion, I think, of its real and true value. The real estate amounts, debits and credits, being added and deducted, would show what the account should represent.

Q. 194. For what period of time have you been occupied since the 2d day of April 1885, at your banking house in Portsmouth, and in what capacity?

A. I cannot say that I have been occupied for any period of time other than the trustees have requested. I do not mean to say that I have been employed by them.

Q. 195. From what date to what date has your daily business or occupation continued since the 2nd day of April, 1885? In whose service and what work did you do and where?

A. I have had no daily occupation. I have been in no one's service other than before referred to.

Q. 196. Describe that service and say how long it continued.

A. Answering enquiries of the trustees whenever they desired it, it has not ceased at the present moment.

Q. 197. Have you lately removed or changed your daily attendance from the office of the trustees in Portsmouth to any other place?

A. Since Mr. Atkinson opened an insurance office on High street, I have been chiefly there, but I think I have been to the trustees' office a few moments of almost every day when the weather permitted and I was in the city.

Q. 198. Now say what assistance you rendered the trustees.

A. Answered their inquiries and gave them such information as I possessed as would enable them to understand the affairs of the office.

Q. 199. Did you help them make up any statement of the assets and liabilities of Bain & Bro.?

A. If they asked any information of me I gave what was in my power. I don't remember of doing any more towards the statement of assets and liabilities.

Q. 200. Do you know that such a statement has been made up with your assistance, if so, state what amount of assets and liabilities is shown thereby.

A. The Court is in possession of all the statements that I know of in regard to the assets and liabilities. There has been no such statement made up with my assistance. I have been referring to the "Inventory."

Q. 201. Then you do not know what these liabilities amount to of Bain & Bro.?

A. I do not know exactly.

Q. 202. Have you read the order of Court, entered on the 11th day of November, 1885, under which the examination is now proceeding, if not, the Master will please read the same to you now.

A. I may have done so. I think I have.

Q. 203. Will you now examine a statement here handed the Master, dated December 17, 1884, containing a list of notes of Bain & Bro., nine in number, each for the sum of $25,000.00 and say whether the notes mentioned in said list were discounted for the benefit of Bain & Bro. at the Exchange National Bank, if so, upon what security or endorsement and whether the transaction appears on your firm's books.

(Here the Master takes statement, annexes it to this question and hands it to the witness for his examination and answer, numbered p. 71½.)

(71½.)

1884.

Dec. 17, BAIN, GEO. M. JR., Cash'r,				$220,475.69
9961¼	Bain & Bro	4-1	$25,000	
9961½	" "	4-8	25,000	
9961¾	" "	4-19	25,000	
9962¼	" "	5-2	25,000	
9962½	" "	5-8	25,000	
9962¾	" "	5-19	25,000	
9963¼	" "	6-1	25,000	
9963½	" "	6-8	25,000	
9963¾	" "	6-19	25,000	
			$225,000	
	Less Disct		$4,524.31	$220,475.69
Dep. to credit Bain & Bro			$185,475.69	
G. J., "M. M." fo. 367			20,000	
Nat. Park B'k "B. & B." 12-19, 12-16			15,000	$220,475.69

(Statement annexed to question 203
[Signed] C. T. Barry, Spl. Master.)

A. To enable me to definitely answer your question, I should have access to certain memoranda in the hands of the trustees.

Q. 204. Can you not then say after examining your books here whether that transaction appears or does not appear on them?

A. I have not examined my books in the hands of the Master in order to answer your question.

Q. 205. That is what you are summoned for; please make the examination at once and report the result?

And the examination is now adjourned over to Friday, February 19, 1886, at 10 A. M.

FRIDAY, February 19, 1886, 10 A. M.

Examination of the witness, R. T. K. Bain, resumed:

Present T. S. Garnett, counsel for Plaintiff, Legh R. Page of counsel for Trustees, &c.

(Witness, R. T. K. Bain, having examined the books mentioned in question No. 205 from 11 A. M. this day to 12:45 P. M. preparatory to answering question No. 205, and the Special Master having been summoned to

Portsmouth, it is now, in his absence, by consent of the above named counsel, agreed that the answer of the witness to the question No. 205 be taken down in writing by Mr. A. R. Hanckel, and examination proceeded with by direction of the Special Master.)

Answer to Question 25. I believe that the notes mentioned by you, nine in number, of $25,000 each, were discounted on or about December 17, 1884, by the Exchange National Bank for the benefit or credit of Bain & Bro. The bank had certain securities of Bain & Bro. which were held by them intended as security for all their transactions with the said bank. The notes were made and endorsed by Bain & Bro. I think the transaction appears on the firm's books, to-wit: on stub book on marginal page appears opposite stub check bearing date January 19, 1885, the following amounts, to-wit: W. M. & Co., $1,000; W. M. & Co., $1,000; Dep., $7,228.75, and on page 114 of Tickler L, January 21st, 1885, will be found the following entries to bills payable, $10,284.70; Tickler head reads "Cash," and has Dr. to the left of it, with figures 114 above the Dr,; then on page 115 of Tickler L, January 21, 1885, will be found the following entry, "By Exchange, $2,716.02;" this is where I think the transaction appears.

Q. 206. The items you have mentioned in your last answer aggregate credit for bills payable of $19,513.45, and the debit to "Exchange" of $2,716.02. The transaction enquired of in question 203 and 205 relates to the discount of $225,000 worth of Bain & Bro.'s paper, the discount on which appears by the statement handed you to be $4,524.31, the net proceeds of discount being $220,475.65; can you say how these proceeds were applied?

A. The statement annexed to question 203 seems to show how the proceeds were applied, and shows that $185,475.69 went to the credit of Bain & Bro. on the books of the Exchange National Bank, and that the balance went to the credit General Journal, M. M, folio 367, $20,000, and National Park Bank, B. & B., 12-19, 12-16, (I think this means twelfth month and 19th day, and twelfth month and 16th day), $15,000, and on the pass book under date of December 18, 1884, will be found a credit of $185,478.89; the $20,000 and the $15,000 above referred to, no doubt, represent the amounts that were due to the Exchange National Bank by Bain & Bro.

Q. 207. Have you any list of bills payable of Bain & Bro.?

A. I have a list of those which are unpaid; I mean to say the trustees have it.

Q. 208. What memoranda do you mean in your answer to question 203, as being in the hands of the trustees?

A. I alluded to the memoranda of Bills Payable mentioned in answer to question 207, but on examination of the said memoranda at the Trustees' office this morning, I found there was nothing that referred to it.

Q. 209. Don't you know what those two items mentioned in your answer to question 206, to wit: $20,000, and $15,000, actually were, and do your books not show what they were?

A. I do not know any more about them than I have stated in regard to

them in answer to question 206. I think it likely that they were notes of Bain & Bro. The books do not show them as far as I have been able to see in my examination, and as I have stated many times before, these transactions appear on the books of Bain & Bro. as a result and not in detail.

Q. 210. Please examine another statement now handed to the Master, bearing the dates respectively of two transactions in Bain & Bro.'s paper with the Exchange National Bank, to wit: January 20th, 1885, and February 26, 1885, which statements are taken from the books of the Exchange National Bank, now being examined in connection with the books of Bain & Bro., and look at the transaction of January 20, 1885, embracing a list of Bain & Bro.'s notes, eight in number, each for the sum of $25,000, and the transaction of February 26, 1885, embracing a list of four other notes of Bain & Bro., each for the sum of $25,000, the whole aggregating $300,000, and say whether the said notes were discounted at or about those respective dates, at the Exchange National Bank of Norfolk, if so, by whom were they made, for whose benefit, and with what security or endorsement, and whether the said transactions appear on the books of Bain & Bro., and if so, where?

(Here witness proceeds to examine the books preparatory to answering this question, which he has previously examined, beginning at 2:20 P. M., and not being ready to answer at 3:20 P. M., the examination was adjourned to Saturday, February 20, 1886, at 10 A. M.

(P. 76½)

1885,					
Feb'y. 26,	BAIN. GEO. M. JR., Cashier.				$97,694.44
10097¼	Bain & Bro		7-12	$25,000	
10015½	"	"	7-29	25,000	
10097¾	"	"	8-22	25,000	
10098¼	"	"	8-29	25,000	
				$100,000	
	Less Disc't			2,305.56	$97,694.44
1885,					
Jan'y. 20,	BAIN, GEO. M. JR., Cashier.				$196,541.68
10015¼	Bain & Bro		2-23	$25,000	
10097½	"	"	3-30	25,000	
10015¾	"	"	4-13	25,000	
10016¼	"	"	5-13	25,000	
10016½	"	"	6-13	25,000	
10016¾	"	"	7-6 1-3	25,000	
10017¼	"	"	7-11	25,000	
10017½	"	"	7-17	25,000	
				$200,000	
	Less Disc't			3,458.32	$196,541.68
Item Rec. Tellers Cash				$ 59,725.97	
Dept. to credit, Bain & Bro				136,815.71	196,541.68

(Statement annexed to question 210, page 76 depositions,)

SATURDAY, 10 A. M., February 20, 1886.

The examination was continued.

The witness, having examined the books to 11:45 A. M., answered question 210 as follows:

A. I have not been able to find the transactions on the books. The statement of the notes mentioned in question 210 having been taken from the books of the Exchange National Bank, shows the notes to have been discounted at said bank, and were for the benefit and credit of Bain & Bro. The Exchange National Bank held certain securities for all the transactions of Bain & Bro. with said bank. These notes were endorsed by Bain & Bro. and made by Bain & Bro.

Q. 211. How were the proceeds applied in the transaction of February 26, 1885; $100,000, less discount $2,305.56, proceeds being $97,694,44?

A. I find on pass book "5." under date February 26, 1885, a credit of that amount and feel satisfied that this is the way the proceeds were applied. The amount so found in said pass book is $97,694.44?

Q. 212. Now look at the transaction of January 20, 1885, of $200,000, less discount $3,458.32, proceeds being $196,541.68, and say how these proceeds were applied?

A. As before stated, I think the proceeds went to the benefit and credit of Bain & Bro.

Q. 213. Take pass book and look at the deposits for January 20, 1885, and say whether the credit for any part of this discount appears on the pass book; if so, state the amount?

A. On pass book under date of January 20, '85, I find a credit of $136,815.71. I think this amount is a part of this discount.

Q. 214. What application was made of the other part, to wit, $59,725.97?

A. I have not been able to find the amount mentioned in the book

Q. 215. Have you searched for it thoroughly?

A. I have looked for it in the books containing accounts of bills payable and on the stub book and on the pass books.

Q. 216. Have you looked anywhere else?

A. I have not; I thought it might work out among other items.

Q. 216½. Look at the statement marked "annexed to question 210" by the Master; examine next to the last line of that statement which reads, "Item receiving teller's cash, $59,725.97," and say whether this balance of proceeds of that discount is indicated thereby, and what meaning does that convey to your mind?

A. It indicates that it was a part of that discount, and conveys to my mind that it was an item in receiving teller's cash.

Q. 217. An item of whose account and in what receiving teller's cash?

A. The account of Bain & Bro. by the receiving teller of the Exchange National Bank, I suppose.

Q. 218. Do you mean a debit of Bain & Bro. for $59,725.97 to the Exchange National Bank carried in the receiving teller's cash?

A. I am not familiar with their accounts; I think that is what it means.

Q. 219. Do you mean that by your answer to question 217?

A. Yes, sir.

Q. 220. Can you say whether you have any recollection or not of what that item of indebtedness, $59,725.97, to the Exchange National Bank, to which was applied a like amount of the proceeds of the discount of $200,000 of your paper on January 20th, 1885, really was?

A. I cannot say that I have.

Q. 221. Whatever it was, was it retired from the said receiving teller's cash by the said balance of the proceeds of that discount?

A. It would appear so from the statement.

Q. 222. Don't you know it is so?

A. I should think so from this statement. I have not found the amount on the books, therefore I cannot say that I know what the entry of receiving teller's cash of the Exchange National Bank is.

Q. 223. If an item of indebtedness of Bain & Bro. to the Exchange National Bank of $59,725.97 was retired from the said receiving teller's cash at said bank on January 20th, 1885, where ought it appear on your books, if anywhere; show where it is; make the examination now; if you cannot now do this we will proceed to another question?

A. It ought to appear, I think, to the credit of bills payable.

Q. 224. But you say above that you do not find it on "bills payable;" is that so?

A. I do not remember of saying so, although I do not remember of seeing it in my search of the books.

Q. 225. Are you not very familiar with your books?

A. I suppose I might say that I am somewhat familiar with them.

Q. 226. Then say whether you are very familiar with them or not?

A. I think I am familiar with them; I think I am somewhat familiar with them.

(Here the Special Master repeats the inquiry two or three times, and in answer to a repetition of the inquiry witness repeats, "I think I am somewhat familiar with them.")

Q. 227. Are you more familiar with them than any other person living?

A I cannot say that I am.

Q. 228. Do you think you are?

A. I cannot say that I do.

Q 229. The Master is requested to read to the witness from the answer filed by him in this cause the following language found on page 10 of the printed part of the answer to the amended bill of the plaintiff, as follows: "And the defendant, R. T. K. Bain, has given such assistance, without fee or reward, however, to the said trustees touching the books and unsettled accounts of Bain & Bro. (with which he was more familiar than any other person living) as he was called on to give, or as he thought proper"; say whether it is a fact that you are more familiar with the books and unsettled accounts of Bain & Bro. than any other person living?

A. I think I am as familiar with them as any person living. I may have been more familiar with them at the time of filing the answer, but at this time I cannot say that I am more familiar with them than any other person living.

2 P. M.—The examination is here adjourned to Tuesday, February 23d, 10 A. M. CHAS. T. BARRY, *Special Master.*

TUESDAY, February 23d, 1886, 10:50 A. M.

Examination continued:

Present—T. S. Garnett, Counsel for Plaintiff, Richard Walke, of Counsel for Trustees.

Q 230. Say whether you are as familiar with the books as when you filed your answer, to-wit, September 7, 1885; if not, why not?

A. I do not know that I am as familiar with them, as I have not had occasion to refer to them as often as previously, and each day that passes I feel that I am that much more out of practice.

Q. 231. Who knows more about them them than you do?

A. I cannot say that I think anyone does.

Q. 232. In addition to the business mentioned by you in your answer to question No. 137 state whether you conducted the business of buying and selling guano or fertilizers up to the time of your failure?

A. I think I mentioned merchandising in answering the question referred to, and in that branch the purchase and sale of guano was included. Since I was here on Saturday I have examined certain data in regard to the amount enquired about and am prepared to give you the information I have obtained.

Q. 233. Who attended specially to that guano business?

A. Mr. Geo. R. Atkinson, Jr.

Q. 234. Did he or you make the contracts for the purchase of guano?

A. I made the contracts.

Q. 235. And directed Mr. Atkinson how to keep the accounts, did you?

A. I did not direct him how to keep the account, as he was a bookkeeper and knew for himself.

Q. Who gave Mr. Atkinson the data from which this guano account was posted into the Ledger?

A. He got it through the orders and through myself.

Q. 237. Now, show what data you have examined since Saturday, Feb. 20, 1886, and say what that item of $59,725.97 really was?

A. I have examined the book known in our office as the "Scratch," and the checks given by Mr. Atkinson about the date mentioned and find a check of his for $63,184.29, which is payable to "Guano." From him I learn that this check was given in payment of a draft for $59,725.97; the difference between the first amount named and the last amount of $59,725.97 is $3,458.32, which appears to be the amount of discount on the statement.

Q. 238. Whose draft for $59,725.97 was this, and for what was it drawn, and on whom; have you the draft; if so, produce it?

A. (Witness here produces the draft and reads as follows:) "The draft was by Robert Norman & Co., of New York, drawn for guano, ex Mount Edgecombe," drawn on Messrs. Bain & Bro., Portsmouth, Va.

(The Master is requested to file this draft or file a copy of it.)

Q. 239. Was this the cargo of guano brought by the "Mount Edgecombe" purchased by Bain & Bro.?

A. Yes, sir, I think it was.

Q. 240. Now look on your guano account headed "Guano ex Mount Edgecomb," on Ledger B, page 90, and point out the transaction, date and amount?

A. On Ledger B, page 90, there appears an account headed "Guano ex Mount Edgecombe" and at the date of January 22, 1885, there appears the amount of $63,184.29; these figures seem to correspond with those previously given.

Q. 241. So the whole discount, to wit: $3,458.32 on the $200,000 of notes was added to the $59,725.97, and charged to that guano account, was it?

A. I think , it appears so from the books and papers.

Q. 242. W was this?

A. I cannot say why; there was no reason for it that I know of, except that it appears to be so.

Q. 243. Let the Master see the check that George R. Atkinson drew and which you have mentioned above?

(Witness here produces the check.)

(By plaintiff's counsel the Master is requested to file this check or a copy of it here.)

Q. 244. Explain what this paper, which you call a check, of Mr. Atkinson means; how did Atkinson manage such transactions; on whom did he draw?

A. For such moneys as was needed for the accounts under Mr. Atkinson's charge, he drew checks on Bain & Bro. similar to the one just filed.

Q. 245. Now take the statement handed you by the Master, dated Dec. 24, 1884, showing a list of Bain & Bro.'s notes, three in number, each for $25,000, and say whether said notes were discounted at the Exchange National Bank at or about that date; if so, upon whose endorsement alone or with what security and for whose benefit, and where does the transaction appear on your books?

(Witness before answering this question, desires to make a statement which he does as follows: "There may be transactions found on the books of the Exchange National Bank which may not appear on the books of Bain & Bro., but such transactions will be or can be, I think, fully explained by the books of the Exchange National Bank.")

[Statement annexed to question 245, Dep., R. T. K. Bain.]

C. T. Barry, Master.

1884.

Dec. 24,	BAIN, GEO. M. JR., Cash'r.			$73,392.36
9968¼	Bain & Bro	4-27	25,000	
9969½	" "	5-27	25,000	
9969¾	" "	6-27	25,000	
			$75,000	
	Less Disc't		1,607.64	73,392.36

A. On pass book "4," at the date of Dec. 24, 1884, I find credit of $73,392.36. This appears to be the proceeds of the notes as per statement just handed me, and were discounted on or about the date aforesaid. The notes were made and endorsed by Bain & Bro. The Exchange National Bank held certain securities for the payment of all the indebtedness of Bain & Bro.

Q. 246. But state if the transaction appears on your books?

A. I do not find the transaction in detail on my books, but it is there I have no doubt, as a result.

Q. 247. Examine the three statements or lists of Bain & Bro.'s notes aggregating $600,000, discounted as aforesaid, at the Exchange National Bank, and say what was the rate of discount thereon.

(NOTE.—Examination asked for by the foregoing question having now consumed forty minutes, witness is asked to specify the discount on one or more of said notes which he has calculated.)

A. The one of Dec. 14 appears to be at about the rate of five per cent. per annum. This is the only one I have calculated and I have just finished that one.

Q. 248. You have stated that the Exchange National Bank, at the times of these several discounts, held certain securities for the payment of all the indebtedness of Bain & Bro.; now state what those securities were, and were they so held in December, 1884 and January, February and March, 1885?

A. These securities consisted of Seaboard Cotton Compress Company's stock of about $300,000; Meherrin Valley Railroad bonds, $200,000; Southern Telegraph bonds about $140,000. They were so held at or about the dates mentioned, or were considered as so held by the said bank and by Bain & Bro.

Q. 249. Are these all the securities you have referred to which the bank was considered by you to have held?

A. I think these are all.

Q. 250. Were they in the hands of the said bank in December, 1884; if not, where were they?

A. The stock of the Seaboard Compress Company was; the Meherrin Valley Railroad bonds were being signed by Mr. Whitehead one of the trustees; I do not remember when they were completed. The Southern Telegraph bonds were at Bain & Bro.'s in Portsmouth.

Q. 251. What evidence have you that the Seaboard Cotton Compress Company's stock was pledged with the Exchange National Bank for the payment of all of Bain & Bro.'s indebtedness there?

A. They had the certificates of stock, with a power of attorney on the back, with a blank transfer, or intended so to be.

Q. 252. Was the blank transfer signed by Bain & Bro. on these certificates, if so, when?

A. The transfer was signed, or intended to be, by the party in whose name the stock stood. I cannot say when exactly; some part of it was signed since the suspension of the Bank.

Q. 253. Then the pledge of it to said bank was not complete when

your paper was discounted in December, 1884, and in January, February and March, 1885, was it?

A. If the signing of the transfer rendered it incomplete, then it was so as to the amount unsigned. The bank held the certificates.

Q. 254. Did you execute any note to the Exchange National Bank in which the Seaboard Compress stock was specified as collateral?

A. I think there was a note specifying some of it.

Q. 255. Are these securities, mentioned in your answer to question 248, the same stocks and bonds mentioned in your agreement of March 31, 1885, referred to on page 7 in the plaintiff's amended bill here handed you by the Master?

A. Yes, sir; I think they are.

Q. 256. And the same which, by that agreement, were delivered to said bank in exchange for notes of Bain & Bro. and other items of indebtedness to said bank amounting to $570,000; is that so?

A. They are the same that were delivered by virtue of a sale made to said bank and notes to that amount were surrendered to us. This, as I understand it, was done by the order of the President of the bank, and I think by advice of the counsel.

Q. 257. By advice of what counsel?

A. Counsel of the bank—Messrs. Tunstall and Thom, I think.

Q. 258. Do you mean that notes for $570,000 were surrendered to you in that transaction?

A. All of the amount was not consumed by notes.

Q. 258½. Examine plaintiff's amended bill at page 27, and say if the items mentioned on said page in the clauses marked 1st, 2d, 3d and 4th, make up the sum of $570,000, and are these the items of indebtedness of Bain & Bro. withdrawn from the said bank under that agreement of March 31st, 1885?

A. These are the items of indebtedness delivered to Bain & Bro. under that agreement.

Q. 259. Why do you think this sale was made by the order of the President of the bank?

A. Because, if I mistake not, I heard him so order.

Q. 260. When and where did he so order?

A. It was in the office of Messrs. Tunstall and Thom, on the 31st day of March, 1885, the date of the agreement.

Q. 261. Was there a meeting of the directors of the Exchange National Bank that day, and were you a director and present thereat?

A. I think there was; I was a director and was present.

Q. 262. Was the President then and there present, and name others of the board who were present?

A. The President was not there; James G. Bain, Vice President; Chas. E. Jenkins, R. T. K. Bain, Mr. Frank McDonald (who I understood to be representing his father), Messrs. Tunstall and Thom, George M. Bain, Jr., I think, was there, and James H. Toomer. I think these are the persons who were present.

Q. 263. Did you make any promise or pledge to the counsel of the said bank at the time of the settlement on the 31st day of March, 1885, in con-

nection with the guarantee contained in your agreement of that date; if so, what was it?

A. I made no promise which I understood to be in connection with that guarantee.

Q. 264. Did you make any promise; if so, state what you understood its connection was?

A. I decline to answer this question.

Q. 265. Did you promise the counsel for the bank at the time of and in connection with your said agreement of March 31st, 1885, that you would not impair your ability to comply with that agreement by making any assignment or transfer of your property?

A. I made no promise previous to the signing and delivery of the said agreement. I do not remember of promising not to impair my ability to comply with that agreement.

The examination is here adjourned to Wednesday, February 24th, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

WEDNESDAY, February 24th, 1886—11:08 o'clock.

The examination resumed.

Present: Same as yesterday.

Q. 266. Examine the paper writing now shown you, dated March 31st, 1885, and say whether it is the original agreement of Bain & Bro. of that date delivered to the Exchange National Bank with the securities mentioned therein; if so, say by whom, and in whose handwriting is it signed?

(Master here hands witness the paper dated March 31st, 1885.)

A. No agreement was delivered to the Exchange National Bank with the securities when I understood the purchase of them was being made. The signatures to the writing shown me appear to be in the handwriting of R. T. K. Bain. This is not the first paper that was brought me for my signature. I think the agreement is in the handwriting of Mr. Tunstall. This is the original paper signed by me. It is signed by Bain & Bro. and R. T. K. Bain.

Q. 267. Now say when were the securities delivered to the bank; if not with the agreement, then at what date?

A. I think the stock of the Compress Company and the Meherrin Valley Railroad bonds had been in the hands of the Exchange Bank some time. The telegraph bonds were delivered to the bank the morning of the signing of the agreement that day, March 31st, 1885.

Q. 268. State what price Bain & Bro. and R. T. K. Bain guaranteed that these several securities should bring when sold by the bank?

A. The paper writing just exhibited gives the information.

Q. 269. What was it?

A. Five hundred and seventy thousand dollars.

Q. 270. The question is, how much they should severally bring?

A. Compress stock, $300,000; Meherrin Valley R R. bonds, $200,000; Southern Telegraph bonds, $70,000.

Q. 271. Have you been requested since March 31st, 1885, by the receiver of the Exchange National Bank to comply with your guarantee as to the Southern Telegraph bonds and take the same at $70,000; if so, what was your reply?

A. I think such a request was made. I do not remember the exact language of the answer, but the purport was that I could not at that time comply.

Q. 272. Can you now take the Meherrin Valley Railroad bonds at $200,000?

A. I cannot.

Q 273. Or the Seaboard Cotton Compress Company's stock at $300,000?

A. I cannot.

Q. 274. In whose name did the $300,000 of Seaboard Cotton Compress Company stock stand?

A. I cannot say exactly. I think some was in the name of George M. Bain, Jr., James G. Bain and R. T. K. Bain. I cannot designate the respective amounts.

Q. 275, Did it all belong to Bain & Bro. and not to the individual members of your firm?

A. It all belonged to Bain & Bro.

Q. 276. Can you say how and where this appears on your books?

A. I cannot; I do not think the entries for it have ever been made.

Q. 277. How, then, was it purchased?

A. The Seaboard Cotton Compress Company purchased our property in Gosport, which was paid for in stock of said company. We also received stock from capitalization of part of the profits of said company, and the balance we got from Mr. C. W. Grandy and his brother, I think.

Q. 278. Say how much of that stock you took for your property in Gosport; how much you got by stock dividends of the company, and how much from the Grandys?

A. The Grandys had $100,000 of stock; our property was sold for $125,000, and the balance came from stock dividends, and we got from the Grandys all they owed. This is my recollection of the transaction.

Q. 279. How much did you pay the Grandys for all their said stock?

A. We paid what the Grandys said it cost them. I think it was about $88,000.

Q. 280. Take the shares of stock of the Seaboard Cotton Compress Company, certificates of which are now handed you, and say in whose name they severally stand; how much do they all amount to, and are these all that were delivered to the Exchange National Bank under your agreement of March 31st, 1885?

(NOTE—At 12:40 P. M. Mr. J. Alfred Jones, of counsel for trustees, appears.)

A. They stand in the name of Bain & Bro., 1,470 shares; George M.

Bain, Jr., 540 shares; R. T. K. Bain, 480 shares; James G. Bain, 480. These are the amounts that appear in the certificates in the names of the firm and the several parties These are all the certificates sold to the Exchange National Bank on the 31st day of March, 1885. They seem to amount to 2,970 shares.

Q. 281. How do you account for the difference between 2,970 shares of the par value of $297,000 and 3,000 shares of the par value of $300,000, mentioned in your said agreement; where are the other 30 shares?

A. At a meeting of the Compress Company certain amounts were ordered to be deducted or charged up, and the balance, after declaring a cash dividend of, I think, five per cent., was ordered to be capitalized, and it was understood, if I mistake not, that this would make the stock five hundred thousand dollars at least. If I correctly understand the object of the meeting, it was to make the stock, $500,000, declare a cash dividend of five per cent., and enough would remain to pay the bills, but it seems that there was some misunderstanding, and that all these amounts were paid or charged up, a dividend of five per cent. declared, and the balance was put in stock, which, as I was informed, lacked a few thousand dollars of making the round sum of $500,000. The Compress Company's books will show how the transaction was done, I think.

Q. 282. Then you never had certificates for the missing thirty shares, did you?

A. Not to my knowledge.

Q. 283. To whom did the $200,000 of Meherrin Valley Railroad bonds belong, and with what funds were they purchased, and at what price were they bought?

A. They belonged to the Greenville Land and Lumber Company; they were taken by that company for the construction of the road at their face value, I think.

Q. 284. How did Bain & Bro. get them?

A. They were in Bain & Bro.'s hands as security.

Q. 285. Does the account of the Greenville Land and Lumber Company on your books show what you did with these bonds; if so, point it out?

A. It does not; the entries have not been made.

Q. 286. Then say with what funds and at what price you obtained said bonds?

A. The transaction has never been completed; therefore the amount has never been settled upon.

Q. 287. Please examine the inventory of Bain & Bro.'s assets, filed in this cause by the defendant trustees, and at page 83 of the book containing said inventory, headed "List of stocks, bonds, &c.," and say whether the stocks and bonds there mentioned were the property of Bain & Bro. and attempted to be conveyed to the said trustees by deed of April 6th, 1885?

A. I think they were the property of Bain & Bro. and of the individual members.

Q. 288. Is there anything on your books by which you can show what portion of these stocks and bonds are the property of individual members of the firm, and the property of the firm respectively? If so show some instances.

A. I think there is, at least, for some of them. (Here witness examines the inventory and the books of Bain & Bro.) On ledger "C," page 2 under head of W. B. D. B. Co., July 1st, 1871, to cash $500 and under head of Warehouse Co., page 2, July, '71, to cash $225; on page 4 same book Portsmouth Insurance Co. stock, sundry amounts showing a balance as of July 15th, 1871. On ledger "D" page 8 under head of stocks, date June 30, 1873 to W. B D. B. $850.

Q. 289. Well, how is the distinction made on any of these accounts just named by you, between firm property and individual property, the accounts you have mentioned showing nothing about it.

A. I think all that appears on the books is firm property. The only amounts of the individuals I see in the inventory is "Norfolk College for Young Ladies" that belonged I think, to George M. Bain, Jr.

Q. 290 Now state with what funds and at what price you purchased the 625 shares of Chesapeake & Idaho Gold and Silver Mining Co's stock, mentioned in said inventory, and where is the transaction shown on your books?

(Witness having occupied 25 minutes in examining the books and papers preparatory to answering the last above question now answers as follows:)

A. I have been unable to find the stock mentioned by you on the books. I do not know at what price, and out of what funds it was purchased. It occurs to me that it may have been a transaction of Mr. George M. Bain, Jr.

Q. 291. Do you know with what funds and at what price the shares of stock mentioned in the inventory as follows to wit; 144 Shares Norfolk and Ocean View Railroad Stock, 39 Shares Dismal Swamp Canal Co. Stock, 246 Shares Greenville Land and Lumber Co. Stock, 6,114 Shares Norfolk & Ouray Mining Co. stock were purchased, and if so, say whether they belonged to the firm or individual members thereof and how can you show it?

A. I think the Norfolk & Ocean View Railroad Stock and the Dismal Swamp Canal Co. stock was purchased with the funds of Bain & Bro. There was nothing paid for the Greenville Land & Lumber Co. stock that I know of. The other, the Ouray Mining Co. stock, I cannot say what was paid for it. Such as I know anything about, were I think paid for by Bain & Bro

Q. 292. Say what part of that Norfolk and Ouray Mining Stock you know anything about, when was it purchased and by what funds?

A. I shall have to examine the books for an answer to your question.

Here witness examines the books and the examination is adjoined to to-morrow morning, Feb. 25th, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

THURSDAY, February 25, 1886.

This examination resumed at 11:15 A. M.

Present: Same as yesterday.

(In answer to question 292, witness says, after examining books to 12 M):

A. I am under the impression that I have seen somewhere on the books something in regard to this Company's stock, but in my examination I have failed to find it. I think it was purchased about 1879 or 1880, perhaps earlier. As before stated, in regard to your question, such as I know about were purchased with the funds of Bain & Bro. I don't believe that any of the trust property of any value was purchased with money obtained from the Exchange National Bank, and even if it should be shown that a little came through the said bank, it would be found, I think, that there was deposits at those times fully equal or exceeding such amounts. Besides deposits made at the said Exchange National Bank by Bain & Bro. some of the merchants of Norfolk doing business with Bain & Bro. were in the habit of carrying their deposits to the said Exchange National Bank, and that bank took them and carried them to our credit on their books, and sent the deposit tickets of said merchants to us.

Q. 293. Name all the merchants of Norfolk who dealt with Bain & Bro. in this way?

A. Jos. C. Norsworthy. Savage, Jones & Lee, Armistead & Benson, C, E. Jenkins, Savage, Son & Co., Jones. Lee & Co, C. E. Yeatman; there may be others that I do not now recollect.

Q. 294. Were Bain & Bro. during the four or five years preceding the suspension of the Exchange National Bank, at all times indebted to the said bank; if so, state about what was the monthly average of said indebtedness, and say generally how it was evidenced.

A. Bain & Bro. had discounts at said bank, but I cannot state the monthly average; the discounts were on what is known as "rediscounted bills receivable paper" and our own notes; they were thus indebted during the period mentioned, I think.

Q. 295. And do the proceeds of the rediscounted paper and of Bain & Bro.'s own notes for the bulk of your deposits during that period?

A. It will take considerable work to definitely answer this question, as Bain & Bro. deposited many hundreds of thousands of dollars, I think, besides the proceeds of these discounts.

Q. 296. You did business, did you, during the last six months of the existence of the firm with the Exchange National Bank in the same general way as you had done for four or five years previous?

A. I think we did.

Q. 297. Now take this list of deposits, marked "List of Deposits of Bain & Bro., by cashier's checks," here handed you by the Master, showing the following lists of rediscounted paper, to-wit:

Oct. 13, 1884		$125,467 96
" 18, "		41,755 95
Nov. 10, "		65,827 68
" 24, "		115,956 04
Jan. 16, 1885		60,746 37
" 26, "		86,685 50
Feb. 5, "		65,318 19
" 11, "		49,189 37
" 21, "		59,993 47
M'ch 3, "		65,525 83
" 14, "		92,848 87
" 25, "		37,754 33
Amounting to		$867,047 56

and examine your cash book for those several dates through to the end and say whether these discounts appear thereon, and were these the kind of deposits which formed the bulk of your credits at the Exchange National Bank taken in connection with the proceeds of $600,000 of Bain & Bro.'s paper discounted within the same period as already shown you?

(Here witness examines the book.)

[List of deposits of Bain & Bro. by Cashiers Checks.]

1884.

Oct. 13, BAIN, GEO. M. JR, Cash'r.			$125,467 96
Aug. 3, Bryant, Jno. H., Sect. and Tr	$15,000	00	
Sept. 10, Savage, Son & Co	2,500	00	
" 15, Godwin, J. T	850	00	
" 20, Culpepper, R. C. & Bro	900	00	
" 20, Savage, Son & Co	5,000	00	
Aug. 21, Maynard, J. W	3,000	00	
Sept. 20, Allen, W. F	3,500	00	
May 20, Roper, J. L. & Co	921	48	
Sept. 27, Hozier, J. K	1,600	00	
" 14, Trotman, T. E	4,000	00	
" 24, Riddick, A	500	00	
" 27, Savage, Son & Co	5,000	00	
" 20, Roche, W. W	442	30	
Octo. 3, Savage, Son & Co	5,000	00	
" 4, Etheridge & Brooks	7,000	00	
Sept. 2, Dutton, W. C. & Co	5,000	00	
" 5, Carney, S. B	6,000	00	
" 17, Wallace & Son	16,000	00	
" 24, Carney, S. B	5,000	00	
Octo. 1, Wallace & Son	16,000	00	
" 3, Bryant, Jno H., Sect. and Tr	15,000	00	
Sept. 13, Bogart, J. H	3,134	73	
" 27, Powell, Ed	3,500	00	
Octo. 1, Rodman, P	2,300	00	
	$127,348	51	
Less Disct	1,880	55	$125,467 96

1884.			
Oct. 18,	BAIN, GEO. M. JR., Cash'r.		$41,735 95
Aug. 22,	Williams, D. E.	$ 422 87	
Sept. 23,	Davis, Pat	360 00	
Aug. 25,	Allen, W. F.	350 00	
Octo. 16,	Berry, Jno. & Geo	700 00	
" 11,	Norsworthy, J. C	2,000 00	
Aug. 22,	Williams, D. E.	422 87	
Sept. 22,	Norsworthy, J. C	500 00	
" 24,	McHugh, Mary	350 00	
" 29,	Hodges, Thos. M	300 00	
" 6,	Niemeyer, S. W	400 00	
Octo. 11,	McCullough, A. A	500 00	
" 15,	Whitehurst, Thos. M	350 00	
" 15,	Culpepper, B. T	325 00	
June 2,	Berry, Geo	1,900 00	
Octo. 6,	Upshur Guano Co	2,700 00	
" 13,	Etheridge & Brooks	10,000 00	
Sept 23,	Upshur Guano Co	2,500 00	
Octo. 3,	Dutton, W. C. & Co	8,000 00	
Aug. 8,	Jones, Jason	300 00	
Octo. 10,	Wallace, Geo. T.	10,000 00	
		$42,380 74	
	Less Disct	644 79	41,735 9
1884.			
Nov. 10,	BAIN, GEO. M. JR., Cash.		$65,827 68
Oct. 27,	McCullough, A. A.	$ 1,150 00	
" 15,	Sullivan, Mary O	1,000 00	
" 17,	Norsworthy. J. C	1,750 00	
" 27,	Upshur Guano Co	2,800 00	
" 27,	Pendleton, M. M	450 00	
" 27,	Allen, W. F. & Co	325 00	
" 31,	Parker, E. P.	1.300 00	
" 19,	Silverthorn, J. A	900 00	
" 20,	Etheridge & Brooks	15,000 00	
" 22,	Trotman, T. E.	1,500 00	
" 24,	Atkinson, Geo. R. Jr	1,100 00	
Nov. 3,	Cattenhead, W. E.	650 00	
Octo. 25,	Bain, R. T. K., Tres	15,000 00	
" 28,	Carney, S. B.	8,500 00	
" 24,	Ghio, E. G.	600 00	
" 29,	Bryant, Jno. H., Sect. and Tr.	15,000 00	
		$67,025 00	
	Less Disct	1,197 32	65,827 68

1884.			
Nov. 24, BAIN, GEO. M. JR., Cash'r.			115,956 04
Nov. 14, Berry, Jno.	$	600 00	
" 17, Jones, Lee & Co.		10,000 00	
" 14, Niemeyer, H. C., et. al.		2,000 00	
" 8, Berry, Jno., et al.		700 00	
" 14, " "		675 10	
" 17, Jones, Lee & Co.		10,000 00	
" 15, Goodwin, J. T.		825 00	
Sept. 24, Armstrong, S. S.		6,000 00	
Nov. 8, Taylor, J. C.		1,200 00	
" 11, Bryant, Jno H., Sect. and Tr.		15,000 00	
" 16, Etheridge & Brooks		15,000 00	
Octo. 28, Armstrong, S. S.		6,000 00	
Nov. 3, Binford, J. M.		5,300 00	
" 8, Bryant, Jno. H., Sect. and Tr.		15,000 00	
" 14, Carney, S. B		7,500 00	
" 5, Dutton, W. C. & Co.		5,000 00	
" 15, Bryant, Jno. H. Sect. and Tr.		15,000 00	
Octo. 25, Savage, W. B.		650 00	
" 25, Bunting, W. H.		15,000 00	
	$117,950 19		
Less Disct.		1,994 15	115,956 04
1885.			
Jan'y. 16, BAIN, GEO. M. JR., Cash'r			$60,746 37
Dec. 13, Norsworthy, J. C.	$	1,750 00	
" 17, Berry, Jno.		575 00	
" 17, Sullivan, Mary O		975 00	
" 19, Norsworthy, J. C.		1,500 00	
Nov. 17, Wallace, Geo. T.		15,000 00	
Jan'y. 2, Parker, E. P.		1,250 00	
Dec. 4, Wallace & Son		16,000 00	
Nov. 20, Dutton, W. C. & Co.		5,000 00	
Dec. 26, Niemeyer, H. C. & S. W.		5,000 00	
Jan'y. 8, Carney, S. B		7,000 00	
" 13, " "		3,000 00	
Nov. 19, Old, W. R.		1,802 40	
" 19, Carney, S. B.		2,807 30	
	$61,659 70		
Less Disct.		913 33	60,746 37

1885.			
Jan'y. 26,	BAIN, GEO. M. Jr., Cash'r.		$86,685 50
Jan'y. 19,	Jones, Lee & Co	$ 5,000 00	
" 19,	" " "	5,000 00	
" 19,	Goodwin, J. T	825 00	
" 24,	Culpepper, R. C. & Bro	900 00	
Dec. 18,	Wallace & Son	16,000 00	
Jan'y. 19,	Jones, Lee & Co	5,000 00	
" 20,	Riddick, A	500 00	
" 20,	Silverthorn, J. A	900 00	
" 1,	Armstrong, S. S	4,000 00	
" 3,	" "	4,000 00	
" 16,	Etheredge & Brooks	20,000 00	
" 17,	Wallace & Son	16,000 00	
" 20,	Dutton, W. C. & Co	5,000 00	
" 5,	" " "	5,000 00	
		88,125 00	86,685 50
	Less Disct	1,439 50	
1885.			
Feb'y 5,	BAIN, GEO. M., JR., Cash.,		$65.318 19
Jan'y 26,	Culpepper, H. E	$20.000 00	
" 21,	Brady, Jas. D	1,500 00	
" 26,	Upshur Guano Co	2,500 00	
" 20,	Edwards, L. R	10,000 00	
" 24,	Atkinson, Geo. R., Jr	1,100 00	
" 7,	Jordan, R. & W	1,229 37	
" 7,	Ames, J. W., Sr	2,000 00	
" 20,	Edwards, L. R	10,000 00	
" 10,	Wallace & Son	18,000 00	
		$66,329 37	
	Less discount	1,011 18	65,318 19

1885.

Feb'y 11,	BAIN, GEO. M., JR,, Cash.,		$49,187 37
Jan'y 15,	Nash, John & Son	$ 1,500 00	
Dec. 16,	Trotman, T. E	4,000 00	
Jan'y 26,	Norsworthy, J. C	500 00	
Feb'y 2,	King, John T. & Bro	1,000 00	
" 6,	Watts, L. R., et als	3,000 00	
" 6,	Dutton, W. C. & Co	1,891 04	
Jan'y 23,	Trotman, T. E	1,500 00	
Feb'y 6,	Dutton, W. C. & Co	2,588 07	
Jan'y 31,	Richmond Cedar Works	4,607 97	
" 1,	" " "	4,597 25	
" 20,	" " "	10,250 00	
" 31,	" " "	4,590 19	
" 20,	Edwards, L. R	10,000 00	
		$50,044 52	
	Less discount	857 15	49,187 37

1885.

Feb'y 21,	BAIN, GEO. M. JR., Cash.,		$59,993 47
Jan'y 21,	Niemeyer, W. A	$ 600 00	
Feb'y 7,	Ames, B. F	300 00	
" 10,	Etheredge & Brooks	700 00	
" 11,	Niemeyer, W. A	400 00	
" 4,	Carney, S. B	6,500 00	
" 7,	Bryant, John H., Sec. & Tr	15,000 00	
Jan'y 10,	Duke, J. T	1,000 00	
Nov. 19,	Ames, B. F	360 49	
" 19,	Ames, J. E	360 49	
Jan'y 31,	Richmond Cedar Works	4,651 23	
" 1,	" " "	4,656 16	
Feb'y 4,	Love, Alex	500 00	
" 6,	Taylor, J. C	2,000 00	
Jan'y 24,	Savage, W. T	1,121 77	
" 25,	Richmond Cedar Works	9,750 00	
" 29,	Baker, A. V	1,190 00	
Feb'y 2,	Old. W. R. and Ames, L. D	1,000 00	
" 3,	Bryant, John H., Sec. and Tr	10,000 00	
" 3,	Haynes, C. C	1,300 00	
		$61,369 14	
	Less discount	1,375 67	59,993 47

1885.			
M'ch 3,	BAIN, GEO. M., JR., Cash.,		$65,525 83
Feb'y 28,	Culpepper, H. E	$15,000 00	
" 28,	Upshur Guano Co	1,100 00	
" 2,	Carney, W. B	800 00	
" 14,	Norsworthy, J. C	1,750 00	
" 14,	McCullough, A. A	425 00	
" 18,	Berry, John	550 00	
" 20,	Norsworthy, J. C	1,500 00	
" 27,	Duke & Smith	575 00	
" 28,	Trant, J. H	600 00	
" 14,	Bryant, John H., Sec. and Tr	15,000 00	
" 16,	Etheredge & Brooks	15,000 00	
" 6,	Dutton, W. C. & Co	8,000 00	
Jan'y 27,	Armstrong, S. S	6,000 00	
		$66,300 00	
	Less discount	774 17	65,525 83
1885.			
M'ch 14,	BAIN, GEO. M., JR., Cash.		$92,848 87
M'ch 1,	Jenkins, C. E	$ 8,000 00	
" 7,	Carney, W. B	1,000 00	
Feb'y 1,	Wallace & Son	16,000 00	
M'ch 10,	Etheredge & Brooks	500 58	
Feb'y 10,	Wallace, George T.	10,000 00	
M'ch 3,	Armstrong, S. S	6,000 00	
" 3,	Carney, W. B	8,500 00	
" 3,	Bain, R. T. K., Treas	20,000 00	
" 5,	Trotman, T. E	2,414 68	
Feb'y 19,	Bryant, John H., Sec. and Treas	17,000 00	
M'ch 7,	Bogart, J. H	5,218 00	
		$94,633 26	
	Less discount	1,784 39	92,848 87
1885.			
M'ch 25,	BAIN, GEO. M., JR., Cash		$37,754 33
M'ch 12,	Bryant, John H., Sec. and Treas	$15,000 00	
" 17,	Carney, S. B	7,500 00	
" 18,	Wallace, Geo. T	15,000 00	
Dec. 23,	Spivey, J	1,000 00	
		$38,500 00	
	Less discount	745 67	37,754 33

A. I do not see in detail on the cash book the figures to correspond with those named in your question, but I feel satisfied that some of them are there as a result The amounts of rediscounted bills receivable paper, together with the deposits of money, form a great part, or perhaps the great bulk, of the credits of Bain & Bro. at the Exchange National Bank.

Upon the request of the witness, who says that one of his wife's relations is to be buried at 2:30 P. M. this day, this examination is now adjourned (1:15 P. M.) to permit his attendance at the funeral.

Examination to be resumed Friday, Feb. 26, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

FRIDAY MORNING, February 26, 1886—10:40 A. M.

Examination resumed.

Present: T. S. Garnett, counsel for plaintiff; Chas. T. Barry, special master, and J. Alfred Jones.

Q. 298. Of what company was J. H. Bryant secretary and treasurer during the period from October 13th, 1884, to April 2d, 1885?
A. The Greenville Land and Lumber Company, I think.
Q. 299. Were you connected with that company in any way; if so, how?
A. I held some stock in that company.
Q. 300. How much?
A. I don't remember; I think it is on the inventory; that shows 246 shares.
Q. 301. What price did you pay for it?
A. I don't remember of paying anything for it.
Q. 302. How many shares of capital stock were there of that company?
A. I think there was 500, if I mistake not.
Q. 303. What were the assets of that company?
A. I cannot say; I suppose their books will tell.
Q. 304. Don't you know of your own knowledge what they owned when you took their paper?
A. I cannot say that I knew exactly what they owned; what information I had came from the officers of the company.
Q. 305. Is that all you know about it?
A. What information I had came from the officers of the company and what came under my notice in a business way.
Q. 306. Were you one of the original promoters of that company?
A I do not exactly understand your question.
Q. 307. State who organized that company, and when did you become connected with it as a shareholder?
A. I think that company was organized by Mr. M. T. Dill and his

friends. I cannot say the exact date that I became a shareholder; I suppose it was at the date of the certificates of stock.

Q. 308. Was your interest in that company your own individually, or was it your firm's property?

A. I suppose it would be called firm property.

Q. 309. Why?

A. Because whatever profits accrued from it would have gone to the firm.

Q. 310. Now say what you know about the property which belonged to that company when you took the notes of J. H. Bryant, secretary and treasurer thereof, eleven in number, aggregating $162,000 mentioned in the list of rediscounted paper which is annexed to question 297 of this deposition; where was that property situated, and in whose name did it stand?

A. I understood that the company had considerable property, real and personal, which was considered very valuable. It consisted of real estate, bonds, stocks, mill property and personal property generally, situated, I think, in the counties of Norfolk, Southampton, Greensville and the city of Portsmouth. I think it stood chiefly in the name of the company.

Q. 311. Now, Mr. Bain, do you not know that the most valuable part of the company's real estate was situated in the county of Greensville, and the deed for the same was taken in your own name?

(The Master is here requested to note the time it takes the witness to answer.)

A. I know that the deed for a piece of property situated in that county stands in my name—

(Here question is read again.)

—and that it was considered very valuable, and I think was so considered by everybody connected with the company. The reason it stands in my name was because of my paying and endorsing for the purchase consideration. If this may be considered the company's real estate, then it was the most valuable part of it that I know of.

Q. 312. Whose is it?

A. I suppose it will be the company's property when it pays for it; it stands in my name, and the matter with regard to this company is, I think, in the legal process of adjustment.

Q. 313. What did that Greenville real estate cost, and add thereto the cost of all its other assets and say about what you think that company had as a basis of credit when you took their notes?

A. I think it cost about $20,000; I do not know what the cost of all its other assets were; I think it was worth about what the company owed; I think its effects were worth about what the company owed.

Q. 314. What did the company owe? (By Special Master.)

A. They owed about $230,000, I think.

Q. 315. To whom did they owe this amount, and how much of it did they owe to you or your firm?

A. The indebtedness was chiefly due on notes held by the Exchange National Bank and amounts due to Bain & Bro.

Q. 316. Did they owe Bain & Bro. on the same notes held by the Exchange National Bank?

A. Only so far as to the endorsements of said notes by Bain & Bro.

Q. 317. To whose credit did the proceeds of those notes of the Greenville Land and Lumber Co, so endorsed, go?

A. When they were discounted by Bain & Bro. they went to the credit of the Greenville Land and Lumber Company; if you meant to ask as to their discount by the Exchange National Bank, then, they went to the credit of Bain & Bro.

Q. 318. You have mentioned $20,000 worth of that company's property, now say what else you included in your estimate of $230,000 of assets.

A. They were bonds of the Southern Telegraph Company, bonds of Meherrin Valley Railroad Company, mill property, personal property, including stock on hand.

Q. 319. To what credit is the Greenville Land and Lumber Company entitled on their account with Bain & Bro.; name the amount as near as you can?

A. From the representations made to me by the officers of the company and my knowledge of what they possessed, being handled with judicious management, I think they were entitled to the credit they received.

Q. 319 repeated. I want as particular and plain an answer to this question as your personal knowledge can give; say what amount of the company's property you used to pay or reduce your indebtedness to the Exchange National Bank or other indebtedness; what credit should the company now have on your books?

1 P. M. Examination here adjourned to Monday, March 1, 1886' at 10 o'clock A. M.

CHAS. T. BARRY,
Special Master.

WEDNESDAY, March 3d, 1886.

Examination resumed at 11:30 A. M.

Present: R. T. K. Bain, the witness; T. S. Garnett, counsel for plaintiff, and Richard Walke, counsel for trustees.

In the absence of the Special Master it is agreed by counsel that the answer to question 319 be now taken down by Mr. A. R. Hanckel and the examination proceed accordingly.

Answer to Q. 319. I cannot see how I can say what amount of credit the Greenville Land and Lumber Company should now have on the books of Bain & Bro., the matters of that company being in an unsettled condition. The $140,000 of Southern Telegraph bonds and the $200,000 of Meherrin Valley Railroad bonds were in our hands as security for the indebtedness

of the Greenville Land and Lumber Company, and these are a part of the securities sold to the Exchange National Bank. For some time previous to our suspension the affairs of the Greenville Land and Lumber Company had perhaps suffered from want of attention of its officers, in consequence of which and for the protection of ourselves and all concerned, I was obliged to direct its management in a great degree, and finally result almost in its becoming, to all intents and purposes, a part of my business; so that I felt justified in making such disposition of the securities as seemed to me right and proper. I would state that I cannot understand why the amount of $162,000 of rediscounted bills receivable is used in connection with the preceding question, as it does not represent the correct amount that was owing by the Greenville Land and Lumber Company to the Exchange National Bank, the correct amount being $102,000, and not $162,000, as might be inferred; and while rediscounting of bills receivable of Bain & Bro. is being considered, I would state that the chief part of our dealings with the Exchange National Bank was not in these rediscounts nor in the discount of our own paper, or of both combined, for it will appear from the pass books and the stub books for the time mentioned by you, to wit, four or five years previous to our suspension, that Bain & Bro. made very large deposits with the Exchange National Bank, aggregating $1,000,000 to $2,000,000 per annum, or a total amount during that period of from six to seven millions of dollars.

Q. 320. The foregoing answer and argument, I observe, is made from a a written paper in your possession here, and read therefrom by you; is that so?

A. Yes, sir; the foregoing answer to question 319 was so read by me from a paper in my possession.

Q. 321. Please hand the said paper to the Master, and will you let him examine it?

A. Yes, sir.

(The witness here hands the paper to the Master.)

Q. 322. What did your firm get for the property of the Greenville Land and Lumber Company turned over to the Exchange National Bank?

A. We received $270,000 of our indebtedness to that bank.

Q. 323. You have stated that the Greenville Land and Lumber Company's indebtedness, all told, amounted to about $230,000, the greater part of which was due to Bain & Bro.; what, then, does that company now owe to Bain & Bro.?

A. About $130,000, as far as I can say without the books and papers.

Q. 324. But you have your books and papers here before you; can you not show by them how this is possible?

A. Some of the papers in regard to this company's transactions are in the hands of the trustees, I think, or in the hands of counsel.

Q. 325. Whose counsel?

A. The trustees', I suppose; I think I understood them to say so.

Q. 326. Now answer question 324?

(Q. 324 reread.)

A. There appears on Ledger marked "H 2," p. 178. a balance due by

the Greenville Land and Lumber Company of $23,610.29, and on bills receivable register, marked "E," p. 177, will be found four notes of the said company for $25,000 each, making in the aggregate $100,000. The papers in the hands of the trustees will account for the remainder.

Q. 327. Where are the four notes just mentioned by you?

A. They were turned over to the trustees.

Q. 328. Where do you show on your books that these notes were discounted by Bain & Bro.?

A. On tickler marked "L," page 87, under date of August 13th, 1884, will be found four notes of $25,000 each charged to bills receivable, and on cash book, p. 194, under date of August 13th, 1884, will be found a credit of the proceeds thereof to the Greenville Land and Lumber Company of four amounts, each for the sum of $24,787.50.

Q. 329. Do you mean to say in your answer to question 319 that your deposits in the Exchange National Bank, exclusive of the proceeds of your own paper and your rediscounted paper, amounted to six or seven millions of dollars during the four or five years next preceding your suspension; is that merely a guess, or have you made a calculation of the amount?

A. It is not a guess; I have tried to ascertain the probable amount of said deposits for the period named. The information can be had from the pass books and stub books in the hands of the Master.

Q. 330. Have you tried to ascertain what was the aggregate amount of the proceeds of discount of your own paper and your rediscounted paper for those four or five years; if so, state about what it is?

A. I have not.

Q. 331. Then how can you say, as you do in answer to question 319, that the chief part of our (your) dealings with the Exchange National Bank was not in these rediscounts, nor in the discounts of our (your) own paper, or of both combined?

A. I do not think that our indebtedness to said bank was at any time previous to 1884 or 1885 as great as about the time of these years, so that I do not think the aggregate will be found to exceed the deposits.

Q. 332. To illustrate, take your pass book No. 5, for the period from January 16th, 1885, to April 21st, 1885, and say what is the total amount of deposits within that period at the Exchange National Bank by Bain & Bro.

A. They appear to amount to $964,044.92.

Q. 333. Now take the statements of your own paper and of your rediscounted paper, and the proceeds thereof, as shown by the said pass books, and say what part of the above mentioned deposits these proceeds form; give the amount of these proceeds, and say what the difference is?

(The witness here takes the statement referred to.)

A. For the period mentioned the discounts of our own paper and of rediscounted bills receivable appears to amount to $751,549.68; the difference appears to be $212,495.24.

Q. 334. Point out the individual account on your books of George T. Wallace?

A. I don't think he has kept an individual account with us for a great number of years.

Q. 335. I observe in the list of rediscounted paper annexed to question 297, notes of George T. Wallace, four in number, aggregating $50,000; say where your books show the discount of that paper, and to whose credit did the proceeds go?

(Here the witness retired to examine books, and before returning the hour for adjournment arrived.)

Adjourned to 10 A. M. Thursday, March 5, 1886.

THURSDAY, March 4, 1886, 11 A. M.

Met pursuant to adjournment.

Present: The witness, R. T. K. Bain, T. S. Garnett, counsel for plaintiff; L. R. Page, counsel for trustees.

Answer to Question 335. On Bills Receivable Register "E," p. 170, is found Geo. T. Wallace's note due October 13, 1884, for $10,000; on Tickler "L," under date June 10, 1884, p.p. 76 and 77, you will find bills receivable debited and credited with $10,000. And on Bills Receivable Register "E," p. 175, you will find Geo. T. Wallace's note for $15,000 due November 20, 1884; under date of July 26, 1884; under date of July 26, 1884, on Tickler "L," p.p. 84 and 85, you will find bills receivable debited and credited with $15,000. Bills Receivable Register "E," p. 185, you will find Geo. T. Wallace's note for $10,000, bearing date October 10, 1884; under date of October 10, 1884, Tickler "L," p.p. 96 and 97, you will find bills receivable debited and credited with $10,000. Bills Receivable Register "E," p. 187, you will find Geo. T. Wallace's note for $15,000, bearing date November 17, 1884; under date of November 26, 1884, Tickler "L," p.p. 104 and 105, you will find bills receivable debited and credited with $15,000. These particular notes do not appear as having gone to the credit of the party at their dates for the reason that they are renewals of notes given some time ago. Indeed, the last two of the notes mentioned are renewals of the preceding two.

Q. 336. Why were not the proceeding two notes taken up when the last two were given?

A. If I am correct in their being renewals, then, they were taken up.

Q. 337. Why, then, were all four of these notes rediscounted by you at the Exchange National Bank on the following dates respectively, to-wit: January 16, January 26, March 14, and March 25, 1885, as shown by the statement of rediscount now handed you?

(The witness retired to examine books preparatory to answering this question at 12:20 P. M., and now, at 1 P. M., witness returns and answers as follows):

A. A note rediscounted by the Exchange National Bank on January 16, 1885, of G. T. Wallace for $15,000, bears date November 17, 1884, on exhibit marked "Annexed to Q. 297, Deposition R. T. K. Bain." Now one rediscounted for $15,000 by said bank on March 25, 1885, bears date March

17, 1885, on exhibit annexed to Q. 297, R. T. K. Bain deposition. On March 14, 1885, one rediscounted for $10,000 by said bank bears date February 10, 1885. The one mentioned as of date January 26, 1885, I do not find on exhibit annexed to Q. 297. The one dated November 17, 1884, at four months from date, would become due about March 17, 1885. So that the one of March 17 would appear to be a renewal of the one of November 17, 1884. I see no reason why note dated November 17 at four months cannot be discounted at any time before it becomes due, which would be on March 17, 1885; or that a note dated March 17, 1885, at four months, cannot be discounted before its maturity, the respective dates of discount of the two notes appearing as of January 16, 1885, and March 25, 1885; the one for $10,000 appears to bear date February 10, 1885, and discounted as of date March 14, 1885. The first note, falling due about March 17, 1885, has doubtless been paid to the Exchange National Bank, as will appear to be the case with many others, I think.

Q. 338. You have stated in your answer just given that the note of March 17, 1885, is a renewal of the one of November 17, 1884, at four months; were both of these discounted at the Exchange National Bank?

A. They appear so from exhibit annexed to Q. 297, but the one of November 17, 1884, was, I think, paid.

Q. 339. How paid?

A. Paid by check on Exchange National Bank, I think.

Q. 340. I omitted yesterday to ask you after your answer to Q. 323 whether you mean by that answer to declare that the Greenville Land and Lumber Company now owes Bain & Bro. $130,000 after crediting them with $270,000, received by you for their property; please say if you mean this?

A. I do not.

Q. 341. Then say, if you allow them that credit, do they owe you anything; if so, what?

A. If that credit was given they would not.

Q. 342. Ought they to be credited with that amount by you?

A. The matter is in the hands of the trustees; I cannot say I think they ought to have credit for that amount

Q. 343. Give some reason for your not thinking so?

A. Because I think that amount exceeds the cash value of those bonds; *i. e.*, the Meherrin Valley Railroad bonds and the Southern Telegraph Company bonds.

Q. 344. Now, returning to the rediscounted bills receivable, I observe in that list now before you a statement of notes of Wallace & Son, seven in number, each for the sum of $16,000, except one, which is for $18,000; state what amount of debt Wallace & Son owed you, exclusive of these notes, on the 1st day of April, 1885?

Adjourned until Friday morning.

FRIDAY, 10 A. M., March 5th.

Adjourned to Saturday on account of sickness of witness.

SATURDAY, 10 A. M., March 6th.

Adjourned to Monday, March 8th, for same cause.

MONDAY, March 8th, 1886—11:30 A. M.

Examination resumed.

Present: R. T. K. Bain, the witness; T. S. Garnett, counsel for the plaintiff; Richard Walke, counsel for trustees, &c.

A. to Q. 344. The indebtedness of Wallace & Son amounts, I think, to over $300,000. On Ledger "F" 2, p. 434, Wallace & Son stands overdrawn as of date December 31st, 1881, $151,259.55. On Ledger "H" 2, p. 444, Wallace & Son stands overdrawn as of date April 1st, 1885, $99,495.58. On bills receivable register "F," p. 3, will be found the following notes: One for $18,000, due June 6th, 1885; one for $18,000, due July 13th, 1885. The above does not include interest due on the open accounts for several years, and I think that there is an an amount due on open account for merchandise. The above is exclusive of the notes mentioned as contained in the list of rediscounted bills receivable on statement annexed to Q. 297. Again I would call attention to the fact that there are contained in this list of rediscounted bills receivable on exhibit annexed to question 297 a great many notes which have been paid, and also that many of those contained in said list are but renewals, the renewal notes, as well as those which have been retired, being embraced in the said exhibit annexed to Q. 297. In the case of Wallace & Son the note on the said list of October 13th, 1884, appears as follows: "September 17th, 1884, Wallace & Son, $16,000," which note was payable four months after date, and would become due about January 17th, 1885. Now on bills receivable register "E," p. 193, will be found Wallace & Son's note bearing date January 17th, 1885, payable four months after date, and due May 20th, 1885, for $16,000. And on Tickler "L," pp. 114, 115, will be found under date of January 22, 1885, that bills receivable is debited and credited on that day with $16,000, thus showing the note due May 20th, 1885, to be a renewal of the one due January 17, 1885, the one due January 17, 1885, being retired. The same is applicable to another note on the same list.

(NOTE BY COUNSEL FOR PLAINTIFF—The above answer, from the words "Again I would call attention" to the last sentence above written and inclusive thereof, is irrelevant, and the Master is requested to ask the

witness to say in round numbers, as near as he can, what was the indebtedness of Wallace & Son to Bain & Bro. on April 1st, 1885.)

Answer continued as follows: From the books I find the answer to be $297,961.49; this does not include the interest on the open accounts for a number of years.

Q. 345. Is the account of Wallace & Son correctly shown on your books, and have they received credit on your said books for the five notes of $16,000 each mentioned at the top of p. 5 of the plaintiff's printed bill; and are the said notes the same which were rediscounted by you at the Exchange National Bank and now held by it?

A. To the best of my knowledge and belief, the account is correctly shown on our books, and Wallace & Son's account has received credit on our books for the notes you refer to on page 5 of plaintiff's bill, one of them being for $18,000, however, instead of $16,000; and they are the same which were rediscounted by the Exchange National Bank and are now held by it.

Q. 346. What security, if any, did Bain & Bro have for these large advances to and over-drafts of Wallace & Son?

A. We had no security other than what they owned.

Q. 347. Did you take no lien on what they owned, or require them to deposit any collaterals, or give any other than their own endorsement?

A. We did not.

Q. 348. What amount of their effects, real and personal, did they surrender to your firm after the suspension of Bain & Bro.?

A. The property contained in the deed from the Wallaces marked exhibit No. 1, and the $55,000 received by the Wallaces from the Richmond Cedar Works, as shown by exhibit 2 of the plaintiff's bill.

Q. 349. How was the consideration named in exhibit No. 1 of the plaintiff's bill, to wit, the sum of $151,800, paid by Bain & Bro. to Wallace & Son?

A. By a credit of their indebtedness to Bain & Bro.

Q. 350. Is that shown on your books?

A. I do not think the entries have been carried to the account.

Q. 351. Where are the entries of that on your books?

A. I say I do not think the entries have been made on the books?

Q. 352. How was the $55,000 turned over to you by Wallace & Son?

A. By check on Bain & Bro. for $31,885.70 and notes aggregating $23,114.30.

Q. 353. Whose check on Bain & Bro.; what was its date, and can it be produced?

A. Check of the Richmond Cedar Works; I do not now remember the date; it can be produced, I think.

Q. 354. Please find it, if possible, and let the Master see it to-morrow, will you?

A. I will.

Q. 355. At what price was the property of Wallace & Son mentioned in exhibit No. 1 taken by Bain & Bro.?

A. $151,800.

Q. 356. Was this the fair value of it; if not, what is your estimate of its worth?

A. This was the value placed upon it by the Wallaces; I do not think its fair value exceeds that amount.

Q. 357. What is your estimate of its real value?

A. I have never made an estimate; I do not know what its real value is.

Q. 358. If you allow Wallace & Sons any credits on their account, state what they are, and how much do they now owe your firm in general terms?

A. $91,161.49, exclusive of interest.

Adjourned to Tuesday, March 9th, 1886, at 10 A. M.

TUESDAY, March 9th, 1886, 11 A. M.

Met pursuant to adjournment, and examination continued.

Present: T. S. Garnett, counsel for plaintiff; Richard Walke, counsel for trustees, &c.

Q. 359. Have you the check of the Richmond Cedar Works for $31,875, mentioned yesterday?

A. I have, and here produce it. (Master here makes and files a copy of said check, dated April 3d, 1885, R. C. W., No. 351.)

Q. 360. When was this check delivered to you?

A. About the time of its date; some time between the 3d and 6th of April, 1885.

Q. 361. Has it been charged up on your books against the Richmond Cedar Works?

A. It has not been charged up against the account of the Richmond Cedar Works, but the preliminary entries have been made for carrying out the transaction, I think.

Q. 362. Made where?

A. Made at the banking house on deposit slip used for that purpose.

Q. 363. But not shown on any of your books, is it?

A. I do not think it is.

Q. 364. Nor have Wallace & Son received any credit for it on your books, have they?

A. I don't think they have received any credit for it on the books, only on the deposit slip.

Q. 365. You said yesterday, in answer to question 344, that the statement of indebtedness of Wallace & Son to Bain & Bro. "does not include interest due on the open accounts for several years;" say for how many years this is omitted?

A. I see no entry to indicate interest being charged since September 1st, 1877.

Q. 366. From that date did the debit balance increase year by year again Wallace & Son by reason of advances made by Bain & Bro. and allowing them to overdraw?

A. I think they did.

Q. 367. What other of your depositors besides Wallace & Son did your firm allow to carry large debit balances without charging interest thereon?

A. I do not remember any who had as large balances as Wallace & Son. There were others who had perhaps less amounts.

Q. 368. Name those others?

A, Some others were H. E. Culpepper, John E. West, Armstrong & Son, Niemeyer, Etheredge & Brooks and Dutton & Co.

Q. 379. Then, say how were you or your firm interested, either directly or indirectly, in the business of Wallace & Son, and why you allowed them these large overdrafts without interest?

A. Neither I nor my firm was interested, either directly or indirectly, in the business of Wallace & Son; nor was it contemplated to advance them without charging them interest; there was no reason for these advances other than to aid them in their business.

Q. 370. Did you know anything about their business, and how were you aiding them; what did they do with the monies advanced by your firm to them?

A. What I knew of their business is contained in our answer to the plaintiff's amended bill; the aid referred to was in advances to them; the money, as far as I know, was used by them in their business operations; it was drawn chiefly by checks to persons in their employ.

Q. 371. Did they make no investments with it?

A. All the investments that I am aware of is their investment in the Richmond Cedar Works. They may have made other purchases and they invested in the Norfolk and Ouray Mining Company.

Q. 372. Did they buy no real estate?

A. They may have; the records will show; I think it is likely they purchased some.

Q. 373. How much money did Wallace & Son invest in the Richmond Cedar Works?

A. For their stock in that company they paid $5,000, I think.

Q. 374. How much did Bain & Bro. put into it?

A. $2,500, I think.

Q. 375. Now look at the inventory filed by the trustees in this cause, at pages 32 to 34, and examine the items of real estate from numbers 27 to 40, inclusive, and say whether the pieces of real estate there mentioned are all the property conveyed by Wallace & Son to Bain & Bro., by deed of April 4th, 1885, and whether you know when any of those pieces of real estate were bought by Wallace & Son?

A. The inventory contains all the property so conveyed as for as I know. I know nothing more of its purchase than therein contained.

Q. 376. Did Wallace & Son inform you about their business or ask advances for any particular purpose?

A. They did not specifically inform us about their business when they built their mill and shingle factory, I think they spoke of it. This is the only particular advance that I remember their asking for, except for their general business.

Q. 377. Is it true that Wallace & Son had with Bain & Bro. "almost unlimited credit"?

A. Yes sir, I think it is.

Q. 378. And is it true that Bain & Bro. had with the Exchange National Bank of Norfolk almost unlimited credit?

(Witness commenced considering question at 1:25 P. M. and now at 1:39 gives in his answer as follows:)

A. I do not know that Bain & Bro. had almost unlimited credit at the Exchange National Bank. But Bain & Bro. received large accomodations from the Exchange National Bank on the discount of their own notes and of re-discounted bills receivable. The said Bank held collaterals for the said indebtedness besides the interest in the capital stock and undivided profits amounting to between $200,000 and $300,000.

Q. 379. Say, for instance, what was the extent in round numbers at any one time, of these large accommodations of Bain & Bro. at the Exchange National Bank.

A. I think the accommodation on our own paper was from $100,000 to $600,000, and the re-discounted paper was $150,000 to $250,000, well you might say from $150,000 to $300,000, and a few months previous to our suspension reached the amount mentioned in our answer, to wit: $593,-251.99.

Q. 380. What did you advance Wallace & Son when they built their mill and shingle factory?

A. I do not know; there was no special appropriation for that.

Q. 381. You have said, "This was the only particular advance that I remember their asking for, except for their general business;" say what was that particular advance; can you find it on your books; if so, point it out?

A. I do not remember the amount they estimated for it, and do not think there is anything on my books to show it.

Q. 382. You say you remember it, though; now say wh n they built that mill and shingle factory?

A. I do not remember when the mill was built; I remember Mr. Wallace speaking about erecting it.

Q. 383. Do you know the cost of that property; if not, say what you think it cost?

A. I do not know, and have no knowledge to justify me in making an estimate.

Q. 384. With what funds did Wallace & Son purchase the personal property conveyed by them to Bain & Bro.?

A. As far as I know the funds were checked from Bain & Bro. Some of the amounts were due to hands or employees at the time of making the deed to Bain & Bro., and were understood to be a part of the consideration of the purchase, as also was an amount due to Mr. Parker. I neglected to mention these amounts yesterday on the subject of the amount of the purchase consideration.

Q. 385. And when you took from Wallace & Son a conveyance of all their property in the deed of April 4th, 1885, (exhibit No. 1 of plaintiff's

bill) what amount did you know Wallace & Son and George T. Wallace owed the Exchange National Bank as makers of the notes which you had rediscounted at that bank?

A. About $107,000.

Adjourned to Wednesday, March 10th, 1886, at 10 A. M.

WEDNESDAY, March 10th, 1886—11:30.

The examination was resumed.

Present: Special Master C. T. Barry, Judge T. S. Garnett, for plaintiff; Jas. Alfred Jones, for trustees.

Q. 386. And of the above sum of $107,000, were the five notes of Wallace & Son, amounting to $82,000, accommodation paper or not?

A. They were what is understood as accommodation paper.

Q. 387. And were the notes of W. C. Dutton & Co., which were discounted for you at the Exchange National Bank, also accommodation paper; I mean those now held by the said bank?

A. Yes, sir.

Q. 388. And is it the same case with the notes of S. B. Carney?

A. Yes, sir.

Q. 389. Name some others in that list of rediscounts annexed to question 297 whose notes were accommodation paper?

A. J. W. Maynard, Etheridge & Brooks, P. Rodman, the Greenville L. & L. Company, the Upshur Guano Company, H. E. Culpeper, J. M. Binford and S. S. Armstrong.

Q. 390, Did you know when you took the deed from Wallace & Son dated April 4th, 1885, whether they had any other property left or not; if so, say what you knew then about their estate?

A. That deed conveyed all their estate except as therein referred to; at least it was so understood. I knew of no other property left, except as contained in a deed made since that time.

Q. 391. What had they done with their other property?

A. Their other property was sold to the Richmond Cedar Works.

Q. 392. Say what you think was then the value of that sold to the Richmond Cedar Works?

A. I do not know much about that kind of property, but I suppose it was worth the purchase consideration, which was $55,000.

Q. 393. Do you think it was worth more than that; if so, say how much more?

A. I cannot say that I do.

Q. 394. Do you know what any part of it was worth; for instance, estimate the value of the saw mill at Wallaceton and all the personal property mentioned in the latter part of that deed?

A. The residence, store, mules, oxen, &c., were worth, I should think, from $3,000 to $5,000; the barge and tug boat were worth, I think, from

$6,000 to $8,000; the mill and appurtenances I do not know the value of. Very much would depend, I think, on its being used or in use.

Q. 395. For what period of time were you a director of the Exchange National Bank of Norfolk?

A. I don't know, but I think I was a director some time shortly after we became interested in that bank, about 1870 or 1871, to its close.

Q. 396. And was your partner, James G. Bain, also a director in said bank during all that period?

A. I am not certain, but I think he was.

Q. 397. And was your partner, George M. Bain, Jr., the cashier of said bank during all that period?

A. Yes, sir; I think he was.

Q. 398. State how many shares of the capital stock of the Exchange National Bank of Norfolk were owned and held by Bain & Bro. and by each individual member of your firm at the time of the suspension of the said bank?

A. On page 7 of the answer to the plaintiff's bill will be found a list of the stock owned by Bain & Bro. and each individual member of that firm. Well, it would be 1,046 shares, to which add Thomas A. Bain 91 shares; total, 1,137 shares.

Q. 399. Where are the certificates of these shares of stock?

A. I do not know.

Q. 400. Where were they when your firm suspended?

A. I do not know; I think it probable that my brother had them at the bank—the Exchange National Bank, I mean.

Q. 401. Have you and your firm been assessed by order of the Comptroller of the Currency or notified to pay one hundred per centum on the par value of your said shares of stock?

A. Yes, sir; I think we have.

Q. 402. Have you paid the assessment; if not, why not?

A. No, sir; we were not able to pay it.

Q. 403. Why not able?

A. Because we have not the money.

Q. 404. Did you have the means to pay such an assessment at the time the bank failed?

A. Yes, sir.

Q. 405. What has become of those means?

A. They were conveyed to the trustees in the deed of April 6, 1885.

Q. 406. Have you seen the certificates of the shares of your said bank stock since the bank failed?

A. Not that I remember of.

Q. 407. Do you mean by your answer to question 378 to say that the Exchange National Bank had any lien on your shares of capital stock of said bank as security for your indebtedness to it?

A. I meant to say that we were interested in that bank to about that amount.

Q. 408. Are not your figures a little large; your capital stock, 1,137 shares, at par value, is $113,700; do you estimate your share of the undivided profits at between $100,000 and $200,000?

A. Yes, sir, I did; and the plant was also considered very valuable.

Q. 409. At what do you estimate the total undivided profits of that bank at the time you referred to in your answer to question 378?

A. At from $200,000 to $300,000.

Q. 410. And your share of that was what?

A. Eleven hundred and thirty-seven three-thousandths, I should think.

Q. 411. All of which profits now turn out to be chiefly imaginary; is that so?

A. I have not the means of ascertaining.

Q. 412. What have you done with your shares of stock in said bank?

A. I do not remember of doing anything with them.

Q. 413. Did you attempt to convey all your notes, bonds, bills, accounts, credits, stocks, moneys, &c., by your deed of April 6, 1885?

A. The deed will answer.

Q. 414. Suppose you answer?

A. I made a deed which conveyed all I had; if that was an attempt, then I attempted it.

Q. 415. Did you know when the Exchange National Bank failed that you and your firm would be liable as stockholders to be assessed to pay any deficiency due to the creditors of that bank?

A. I think I did.

Q. 416. Did your trustees, or either of them, also know this?

A. I cannot say what they knew; they can speak for themselves.

Q. 417. Who was your counsel from the time of your suspension until you made the deed of April 6th, 1885?

A. W. W. Old.

Q. 418. Who is now one of the trustees?

A. Yes, sir.

Q. 419. Had he been usually employed as your attorney in your law business prior to your failure; if so, for how long?

A. He had been employed in special cases; others had been employed, but we had but little legal business; I suppose he had been employed as much as an anyone else.

Q. 420. Did you inform him or did he otherwise know that you were a director and stockholder in the Exchange National Bank at the time of its failure?

A. I did not so inform him; I do not know what he knew; I suppose there were but few, if any, who did not know that I was a director and stockholder?

Q. 421. Then you think he knew it, do you?

A. I have no reason to think he did not.

Q. 422. And yet you placed in his hands, as one of your trustees, all the means which otherwise you would have had to pay the assessment against you and your firm, on account of your liability as stockholders of the Exchange National Bank by the deed of April 6th, 1885; is that so?

A. I placed in his hands, along with the other trustees, all the means I had.

Q. 423. Was the stock of the Exchange National Bank above described all firm property or not?

A. I think it might be considered firm property, as I do not think the

amounts of the individual members of the firm were ever paid for by them or charged to their account.

Q. 424. Is it not very difficult for anyone but yourself to define what is firm property and what is individual property respectively, either of your real, personal or mixed assets?

A. I do not think so; when one becomes familiar with our books I think he will see as much as I know.

Q. 425. What is there to show that this bank stock was firm property?

A. Nothing more than was mentioned in answer to question 423.

Q. 426. And what is there to show that the list of stocks on the inventory was firm property?

A. The certificates were paid for by the firm and held by the firm.

Q. 427. And what is there to show that the large number of pieces of real estate, the deeds for which are in your individual name, are firm property?

A. The books and accounts show, and I think some of the clerks know. The rents and revenues from them and the conduct of the farms all go to show that they are the property of the firm.

And here the examination was adjourned to Thursday, March 11th, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

TUESDAY, March 11th, 1886—11:45 A. M.

Met pursuant to adjournment.

Present: R. T. K. Bain, the witness; T. S. Garnett, counsel for plaintiff, and James Alfred Jones, counsel for trustees.

(NOTE.—Mr. H. D. Bulkley, the expert accountant, having been compelled to leave for Chicago on the 13th day of February, 1886, has been absent since that time, and now, on this 11th day of March, 1886, has returned and is here present to continue at this examination.)

Q. 428. Where can you show on your books your investments in the stock of the Exchange National Bank of Norfolk?

A. The amounts have not been carried to a ledger acconnt, so that I will have to show you from the original entries, and the books containing them are not here.

Q. 429. What do you mean by original entries, and what books are not here?

A. I think the amounts were paid by checks, and the stub books will show it.

Q. 430. And is that the only way those purchases are shown?

A. It has been quite a long time; I cannot remember all in connection therewith, but I think I can show the payments or purchases.

Q. 431. State how you or your firm bought all that bank stock. Was it all at the same time or in different lots?

A. It was not all at the same time. We, with another gentleman, purchased the stock owned or controlled by Governor Walker. I think it was $73,000. Our half was $36,500. We afterwards purchased that gentleman's interest. When the capital stock of the bank was increased, we took about $20,000, I think. The remainder in the name of Whitehead and Bain and G. M. Bain, Jr., was attended to by them.

Q. 432. Do you mean when the capital stock was increased from $150,000 to $200,000, to-wit, on September 9th, 1873, that you took $20,000. Wasn't it $25,000 that you took then?

A. I do not remember the exact date, but I think it was when the capital stock was increased from $150,000 to $200,000. I said I thought it was about $20,000. I cannot say from memory that it was exactly $25,000.

Q. 433. How many shares of that increase did you take?

A. About 200, I think.

Q. 434. Do you know what it cost you; if so, state the price?

A. I think it cost $100 a share.

Q. 435. Was any money paid for this subscribtion to increase stock at the time you subscribed therefor?

A. I do not know as to the exact time. My impression was that it was in contemplation some little while, and some parties were undecided about taking a part of the increase. The money was paid for it, but the exact time of payment I cannot now remember.

Q. 436. How was the money paid for it?

A. I think it must have been paid by check.

Q. 437. Whose check and on whom?

A. I do not remember, but I think it likely it was paid by check on the Exchange National Bank of Norfolk drawn by Bain & Bro.

Q. 438 In helping the trustees to prepare your inventory did you list this stock for them?

A I don't remember listing anything in their inventory.

Q. 439. Do you say you had nothing to do with making up their inventory?

A. I say I gave them such information as they asked or I possessed, but I did not list the stocks.

Q. 440. "Or as you thought proper." Was that it?

A. Yes, sir; I gave them such as I possessed.

Q. 441. Then, you possessed the information that all this bank stock was Bain & Bro.'s, did you?

A. All except as I have stated and explained a few days ago.

Q. 442. And you gave them that information?

A. I don't remember anything being said about the stock of the Exchange National Bank. The certificates in our possession for the stocks owned by us were given to the trustees.

Q. 443. Was there any of your or your firm's stocks, bonds or real estate or personal estate of which you had or now have information that you did not mention to the trustees?

A. None of any value, that I am aware of; none that I individually had anything to do with the purchasing do I remember.

Q. 444. Explain what you mean and refer to in your last answer?

A. I meant that there may have been some stocks or bonds owned by some one of my brothers, but if there were any such I did not think they had any value, and that I personally had nothing to do with the purchasing of them that I remember.

Q. 445. But those stocks and bonds that you deemed of little value belonged to Bain & Bro., did they?

A. Not that I am aware of; I do not remember Bain & Bro. purchasing any.

Q. 446. Now say whether you have examined the inventory filed by the trustees in this cause, and if so, say whether or not it embraces all the property of Bain & Bro., and of each member of that firm, owned by them at the date of your failure, of which you had then or now have any knowledge?

A. All that I now remember as not appearing in the inventory that might come under your question would be some Western mining lands now in court, and perhaps some stock in connection with the Southern Telegraph Company or the Washington Improvement Company. And if there is any of this in the name of the firm or in my name it was not purchased by me that I remember. I will also mention that the stock of the Exchange National Bank owned by us is not contained in said inventory.

Q. 447. Are these Western mining lands just mentioned by you the property of Bain & Bro.?

A. I am informed that they belong to George M. Bain, Jr., and John B. Whitehead.

Q. 448. What is the name of that mine and where located?

A. I have understood it was in Colorado; I have heard the names of Laura Dunmore and the Boomerang.

Q. 449. Do your trustees claim this property or any interest in it?

A. They can say; I know there is a suit pending about it; at least I have heard so; I think they only want to do their duty as trustees in the matter.

Q. 450. Do you not know, after consultation with them, that they claim George M. Bain, Jr.'s, interest in these mines under your deed of assignment?

A. I do not know what their real position in relation to the matter is; I think they feel that the land, *i. e.*, George M. Bain, Jr.'s, interest, passes to them under the deed.

Q. 451. Was his interest in it regarded as firm property or his individual property, and how is it shown on the books to be one or the other?

A. It is not shown on our books at all; I did not know of its purchase until about the time of the failure; I cannot say how he regarded it; it was not firm property as I know of.

Q. 452. Do you know what that interest cost, or have you heard what it cost?

A. I do not know, and I don't remember to have heard the amount stated.

Q. 453. Has George M. Bain, Jr., never mentioned the subject to you?

A. What I know I got from him chiefly.

Q. 454. Did he say how he came to buy it?

A. He may have said that a Mr. Echols recommended or mentioned it.

Q. 455. Did your brother George give you the impression that he regarded this purchase as a good venture?

A. I cannot say he did; he never seemed inclined to talk about it.

Q. 456. Did he say he made the purchase jointly with anyone or not?

A. He said he and Mr. Whitehead purchased it, but he did not seem to know how the deed stood; he also mentioned something about a Mr. Echols.

Q. 457. Did he pay for it out of Bain & Bro.'s funds; if so, show how it appears?

A. He did not that I am aware of.

Q. 458. Then how was it paid for?

A. I do not know; he and Mr. Whitehead attended to that, I suppose.

Q. 459. And you never heard either of them say, did you, how they paid for it, nor what it cost?

A. Mr. Whitehead never said anything to me about it that I remember of, nor did my brother say the amount it cost, as well as I can recall; still there seems to be on my mind something about $20,000, but I cannot say where I got the impression, as I have heard others talk about it.

Q. 460. Did either of them ever inform you, or do you otherwise know in any way, that they negotiated a loan, with the proceeds of which they made this investment in the Laura Dunmore and Boomerang mines?

A. No, sir; I knew nothing in regard to any loan negotiated for its purchase.

Q. 461. Did you see and consult with George M. Bain, Jr., frequently during your partnership business and since your suspension?

A. I saw him almost daily before our suspension, and since then I have seen him nearly every week, and perhaps sometimes oftener.

Q. 462. And he has given you the details of this large investment as narrated above by you, but altogether omitted to mention the price paid for these mines, or how he raised the money to pay it; is that so?

A. He has seemed to be desirous not to talk much about it, and I do not remember his mentioning the price or how they paid for it.

Adjourned to Friday, March 12th, 1886, at 10 A. M.

FRIDAY, March 12th, 1886—10:20 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; H. D. Bulkley, expert accountant; R. T. K. Bain, witness, J. Alfred Jones, counsel for trustees.

Q. 463. What was the value of Bain & Brother's interest in the Richmond Cedar Works on the 31st day of March, 1855?

A. Bain & Bro. owned one-fifth interest in the Richmond Cedar Works, for which they paid $2,500. It was considered very valuable property.

It is difficult to estimate the value of such property except from results. I felt that our interest was very valuable—from $20,000 to $50,000 seemed to me to be a fair prospective value.

(NOTE BY COUNSEL FOR PLAINTIFF.)—In order to save time and expense, and in view of the fact that the expert accountant is now here at great expense, the Master is requested to require the witness to cease writing down both the question and his answers thereto, and he has heretofore invariably done, thus enormously increasing the expense of this examination and unnecessarily consuming time.)

Q. 464. What did the Cedar Works owe at that date?

A. They owed somewhere in the neighborhood of between $100,000 and $200,000.

Q. 465. Of this amount how much did they owe the Exchange National Bank?

A. About $140,000, if I remember correctly.

Q. 465½. And do you mean that after the payment of that company's debts on the 31st day of March, 1885, your one-fifth share was worth from $20,000 to $50,000?

A. I considered that its prospective value.

Q. 466. But what was its real value?

A. I do not know.

Q. 467. Don't you know that at that time that company's paper had frequently gone to protest?

A. I do not.

Q. 468. Have you made no effort to have your interest in the Cedar Works ascertained as of the date you sold out?

A. I have not. It was not mine after I sold out.

Q. 469. Was the Richmond Cedar Works a limited partnership association, formed under the Virginia Statute?

A. It was a limited partnership, and if I correctly understand it, it was under a special act.

Q. 470. Your firm was in debt to that concern, was it?

A. They had a deposit with us.

Q. 471. Which you say you have paid since your assignment in full, is that so?

A. Yes, sir; I said it was taken in part of the purchase money by Wallace & Son for the property sold by them to the Richmond Cedar Works, and their said check has been turned over to Bain & Bro. to go to the credit of Wallace & Son on their account with Bain & Bro.

Q. 472. And this was done after you closed your doors, was it, and suspended business as bankers?

A. Yes, sir.

Q. 473. Were Bain & Bro. members of the Norfolk Clearing House; if not, how did you effect your daily clearances?

A. We were not; our clearances were made through the Exchange National Bank chiefly.

Q. 474. Explain the method of your daily settlement with the Clearing House, and where do the daily transactions appear on your books?

A. We sent over in the morning to the Exchange National Bank what items we had for the Clearing House, together, sometimes, with money. After the clearings were made the amount of what we sent over was deducted from the total items held by the Exchange National Bank against Bain & Bro., and for the balance due there was made a memorandum due bill.

Q. 475. Who made the memorandum due bill and what was done with it?

A. I think it was usually made by the teller, if I mistake not, I mean Mr. Ott the teller of the Exchange Bank. Sometimes perhaps by Bain & Bro's clerk or runner. The memorandum due bills were taken up from day to day and I suppose destroyed. The result of the clearings is on the daily settling book.

Q. 476. You say the due bill was taken up from day to day, say taken up from what and how?

A. I mean that the due bill of one day was included in the settlement of the next day along with other clearing items. The final due bill was taken up as a part of the purchase consideration of the stocks and bonds for $570,000 as heretofore referred to.

Q. 477. Do you mean that these due bills were carried from day to day in the paying tellers cash at the Exchange National Bank?

A. I dont know which teller's cash, but I mean they were carried in the teller's cash,

Q. 478. As representing so much money, is that it?

A. As representing so much indebtedness or money due the Exchange National Bank. Some times Bain & Bro. had more to their credit on the books of the Exchange National Bank than the due bills amounted to, and these due bills were reduced by checks on the said account.

Q. 479. Dont you know and did you not then know these due bills of Bain & Bro. were carried from day to day in the teller's cash as a part of the cash on hand of that bank?

A. I suppose they were.

Q. 480. Did the Exchange National Bank have any security whatsoever for these due bills carried as cash?

A. Only the securities that they held belonging to Bain & Bro.

Q. 481. Could Bain & Bro. have paid these due bills on demand?

A. Not at all times, I do not think.

Q. 482. What was the largest due bill so carried?

A. During the latter part of the year 1884, the affairs of the Southern Telegraph Co. was placed in the U. S. Court. The Exchange National Bank held a large amount of bonds of said Co. It being necessary to take some action in regard to them, my time was very much occupied in attending to the interests of the said Bank and the Greenville L. & L. Co. in this suit, afterwards I was taken sick and confined to the house for several weeks. During that time I think the due bills reached about $200,000 or $300,000, which I made efforts to reduce and relieve as fast as possible.

Q. 483. Did the same state of things exist on the 30th Sept. 1882?

A. I do not think they did. I cannot carry so long a time in my mind, but I dont think the due bills was ever as large as the last of 1884 and 1885.

Q. 484. Look at your books and state the amount due Bain & Bro. on clearing house settlement to the Exchange National Bank on November 24, 1884, after the clearances for that day had been made.

A. It appears to be $400,088,01.

Q. 485. What was it for the next day, November 25, 1884?

A. It was $272,725.02 I think. During both of these dates we had over $100,000 to our credit.

Q. 486. Your credit where and on what account?

A. To credit of Bain & Bro. on the individual ledger of the Exchange National Bank.

Q. 487. How was the reduction between the 24th and 25th of Nov., 1885, in your due bills made?

A. By check on the Exchange National Bank drawn by Bain & Bro.

Q. 488. Drawn against proceeds of discount of certain notes, was it not; state the amount of notes?

A. I think Bain & Bro. had considerable funds to its credit at that time, although there appears a discount as of date November 24 and 25, 1884, of $117,950.19. It appears on my books as of the 25th.

Q. 488. Was this the usual mode of reducing your due bills carried on the teller's cash?

A. What mode do you mean?

Q. 490. The mode you have described. By discounting fresh paper either of your own or accommodation paper made for you, or in some instances by real discounts?

A. Our due bills were reduced from time to time by monies sent to the Exchange National Bank. Monies were deposited there from time to time upon which we checked to reduce the due bills; notes and rediscounted bills receivable were discounted and put to our credit, upon which in some cases we drew checks the same as on the deposits, they being the same account. There were perhaps reductions made by the proceeds from discounts which did not perhaps go on the pass books.

Q. 491. Did Bain & Bro. pay the bank any interest on these due bills; if so, state the rate and how you paid it?

A. No money was paid on the due bills for interest that I know of.

Q. 492. Have you any idea or can you form one from your books of the amount averaged per day, for, say five or six years immediately preceding your failure, of your indebtedness on these due bills; if so, state it.

A. I cannot; the books will show it, but it will require considerable work.

("NOTE.—The work has been done for you. Here the Master is requested to let Mr. H. D. Bulkley, the expert accountant, be sworn as a witness to identify and verify the paper now produced, to-wit, a book marked 'Exhibit No. 20, Report of H. D. Bulkley.'"

Question 1 to Mr. H. D. Bulkley, who, being duly sworn, answers as follows:

Q. 1. Is the book now shown you a true statement of the daily balances due by Bain & Bro. on clearing house settlement with the Exchange National Bank carried as cash at said bank, and was it made up under your

direction from January, 1879, to April 1st, 1885, from the books of said bank?

A. It is, and was prepared by Thomas Ott, a teller of said bank, who had charge of the clearing house settlements, and the exhibit was prepared under my personal direction and supervision.

Q. 2. Take the said statement and show from the summary on the last page thereof what those balances for the time above mentioned aggregate, and what is the average daily balance due by Bain & Bro. at the Exchange National Bank by their said due bills carried as cash?

A. The aggregate on the daily due bills for the period named is $130,685,162.80, and the average daily balance for the same period, say six years and three months, is $58,082.28.

Q. 3. What is the amount of interest lost by the bank from failure to charge it on the daily balances?

A. At six per cent. per annum it amounts to $21,780.86, and at nine per cent. it amounts to $32,671.29.

Question to Mr. Bain, 493—

Q. 493. Examine the statement as made by Mr. H. D. Bulkley, and say if it accords with your transactions as shown on your books during that period?

A. I have examined the days of November 24th, 25th, 1884, as before mentioned on my books, and now examined this exhibit No. 20 and find those days correctly stated.

Q. 494. Take one or two other dates at random or anywhere in the statement and compare them with your books here now, and see if they are correct?

A. I find the dates of July 1st, 1883, and July 25th, 1883, agree as to amounts specified on our books and the exhibit No. 20.

Q. 495. Then you think the statement is true and correct, do you?

A. I think it likely is; as far as I have compared I find them to agree.

Q. 496. In addition to the balance due by due bill as carried in cash, what amount of your own notes was the Exchange National Bank carrying for you on the 24th day of November, 1884?

A. I do not know exactly; I suppose from about $400,000 to $600,000.

Q. 497. Can you show this on your books?

A. My books do not show it as a total, and it would take considerable work to arrive at the amount.

Q. 498. Do you mean, then, to say that your books do not show a correct and complete record of your transactions with the Exchange National Bank?

A. I say I think they will show a correct result, but not as complete a record as that of the Exchange National Bank.

Q. 499. Now say what amount Bain & Bro. owed to the Exchange National Bank on the 2d day of April, 1885, on all accounts?

A. I think it is correctly stated in the plaintiffs bill and amended bill.

Q. 500. In answer to question 54 you used the words, "pay to pro forma to Dec, 19th," being the words used in the check for $316,375; say if you know what Bain & Bro.'s pro forma account at the Exchange National Bank actually meant; explain it?

A. I understand that the Exchange National Bank had an account on

their books called a pro forma account. If I understand it, it was an account to which past due paper of Bain & Bro. was carried, and was not made a part of their regular account except as checks were drawn upon the regular account to pay that. It was an account kept, I suppose, for the convenience of the Exchange National Bank.

Q. 501. Do you mean that the past due and unpaid paper of Bain & Bro. and the unpaid accommodation paper discounted by them at said bank were charged to this account and treated on the other account as paid?

A. (Witness here asks): "What do you mean by accommodation paper?"

Answer to witness by counsel: "I mean such accommodation paper as you have described in your answers to questions Nos. 386, 387, 388 and 389."

Witness here again asks: "Have you any objection in giving me your idea of what is meant by the term 'accommodation?' I think we have misunderstood each other in the questions, namely, 386, 387, 388 and 389."

Counsel answers: "You are at liberty to explain your answers to those questions if you feel so disposed."

Witness answers: "I did not mean to convey the impression in answers to the questions 386, 387, 388 and 389 that the notes mentioned therein were borrowed notes. They were discounted and the money paid for them as in the usual course of business."

Q. 502. Now answer question 501?

A. I mean that this was an account for the convenience of the Exchange National Bank, where past due paper was carried, and if I understand it correctly these were relieved or paid by checks drawn on the individual account of Bain & Bro. on that bank. They may have been relieved in some instances by the proceeds of discounts.

Q. 503. Is it not the fact that they were more often relieved by the proceeds of discounts credited to cashier's account and from that account transferred by cashier's check to the credit of Bain & Bro., against which you checked to relieve the pro forma account?

A. This was perhaps done in a good many instances.

Q. 504. Was there any account kept on Bain & Bro.'s books corresponding to their pro forma account at the Exchange National Bank?

A. If I understand the pro forma account of the Exchange National Bank, it was kept on our books in the account termed by us bills payable and rediscounted paper. We did not keep any record showing the past due from that not due.

Q. 505. Say about what was the indebtedness of Bain & Bro. to the Exchange National Bank on this pro forma account on the 24th day of November, 1884, and what was a fair monthly average of such debit balance for the two or three years prior to your failure; or say for one year prior thereto?

A. I do not know.

Q. 506. Now take the inventory of your estate filed by the trustees and say what pieces of property therein mentioned, real, personal or mixed, stocks or bonds, you can now testify were *not* bought by funds obtained by Bain & Bro. or some member thereof from the Exchange National Bank?

(Time consumed in answering this question one hour and thirty minutes.)

A. I have examined the inventory; almost all of the trust property was purchased with the funds of Bain & Bro. I am personally familiar with almost every piece of real estate contained in the inventory, and that it was paid for at the banking house of Bain & Bro., Portsmouth, Va., out of the funds in the hands of the teller. Quite an amount of said real estate was purchased previous to the year 1870. I cannot speak as to the Norfolk and Ouray Mining Company, Chesapeake and Idaho Gold and Silver Mining Company and other mining lands. It may be that an inconsiderable amount might be traced by checks on the Exchange National Bank or otherwise, but even as to some of these there is, in my judgment, considerable doubt of its not having been paid for by Bain & Bro.

The examination here adjourned to Saturday morning, March 13th, 1886, 10 A. M.

CHAS. T. BARRY,
Special Master.

SATURDAY MORNING 10:30 A. M.

Examination resumed.

Present: same as yesterday.

Q. 507. Do you mean to say that almost all of the trust property mentioned in that inventory was purchased out of your general business?

A. I mean that almost all of that trust property was purchased with the funds of Bain & Bro.

Q. 508. Do you mean the funds taken out of your general business?

A. It was purchased out of the firm's money and came out of the general business.

Q. 509. And when you needed money for your general business from what source did you usually raise it?

A. When we needed funds we generally borrowed it from the Exchange National Bank of Norfolk.

Q. 510. Take for instance such transaction as that of the cargo of guano "Ex. Mount Edgecomb," the draft for which was paid by the Exchange National Bank and carried for Bain & Bro. in the teller's cash, and afterwards taken up by part of the proceeds of the discount of $200,000 of Bain & Bro's notes on January 20, 1885, and which still remain unpaid, as to which you have testified in answer to questions 237 to 244 inclusive, would you say that this property had been paid for with the funds obtained by Bain & Bro. from the Exchange National Bank, or not?

A. I should say that this property was paid for out of the proceeds of those notes discounted by the Exchange National Bank for Bain & Bro.

Q. 511. I omitted to ask you to trace a similar transaction in guano occurring on January 18th, 1881. Look on the books and see if there appears evidence that a cargo of guano shipped per the "James Bain" was paid for by the Exchange National Bank as follows:

A draft drawn by Alexander Brown & Sons on Bain & Bro. for $50,511.70 was paid by the Exchange National Bank on the 18th January 1881, and carried in Receiving Teller's cash as a cash item until March 17, 1881, on which date it was retired by proceeds of discount of Bain & Bro's three notes of $20,000 each, the net proceeds of which were $58,830, whereof $50,511.70 was applied to the retirement of the draft from the Teller's cash, and the balance, to wit, $8,318.30 was put on your deposit book No. 2, under date of March 17, 1881, as a credit for Bain & Bro. and is entered on your stub book opposite the date of April 9th, 1881. You will find the entry on the guano account made on May 2, 1881, see your ledger A, folio 272. Are these facts and is this a similar purchase to that of the guano account "Ex. Mount Edgecomb?"

A. I know that a cargo of guano was purchased through Alexander Brown & Sons of Baltimore about the time mentioned, and I also find on ledger A, p. 272 guano account, the amount of $50,511.70, and I find the amount of $8,318.30 on deposit book No. 2, March 17, 1881, and on stub book opposite stub date April 9th, 1881. From the above I should think that this guano was settled for out of the proceeds of the discount of those notes.

Q. 512. Dont you know of your own knowledge that it was so settled for?

A. I have no reason to doubt but that it was.

Q. 512. Repeated.

A. I cannot say that I know it, but I have no reason to doubt that it may have been so settled.

Q. 513. Do you believe and know that the entries on your books just examined by you for 25 minutes establish the fact above stated in question No. 511 and the answer thereto?

A. I believe it and I think the entries on the books establish it and bear me out in so saying.

Q. 514. Now with what funds do you say these two cargoes of guano costing respectively $50,511.70 and $59,725.97, aggregating $110,237.67 were bought.

A. These cargoes of guano were settled for from the proceeds of the discount of those notes.

Q. 515. And these funds are what you call moneys of Bain & Bro.?

A. I think that the proceeds of those discounts would be so styled.

Q. 516. These funds went into your general business, did they?

A. Yes, sir.

Q. 519. Did you sell these cargoes of guano at any advance on the cost; if so, show the profit you made on the $59,725.97 lot—"Mt. Edgecomb?"

A. I should judge that the profit on this cargo of guano was from $8,000 to $10,000.

Q. 518. Now take the inventory filed by the trustees and say what property therein mentioned you can testify *was bought* with the funds obtained by Bain & Bro. from the Exchange National Bank?

A. A piece of real estate on the inventory No. 50, page 38, from W. W. Chamberlaine was settled for, I think, by a check of Bain & Bro. on the Exchange National Bank. There is a piece, numbered 65, 66 and 67 on page 18, which was paid to Judge Garnett, special commissioner, and also a piece No. 58, on page 14. These, I think, were settled for by order on Bain & Bro., and came through the Norfolk banks; I expect it came through the clearing house. The Dismal Swamp Canal Company stock and some of the Norfolk and Ocean View Railroad Company stock and the one share of the stock of the Seaboard and Roanoke Railroad Company came through the clearing house, I think. And number 22, page 30, Peat Co. to Geo. T. Wallace and R. T. K. Bain, was paid the same way.

Q. 519. Specify the dates as near as you can of these several purchases and the payments therefor, as just mentioned?

A. No. 22, May, 1876, $650; No. 50, August or September, 1881, $500; No. 58, April, 1884, $1,137.45; Nos. 65, 66, and 67, Aug., 1881, $768.34; October, 1882, $1,865.16; Dismal Swamp Canal Co.'s stock, December, 1881, $2,100; Seaboard and Roanoke Railroad Company's stock, 1878 or 1879, $90. The Ocean View Railroad Company's stock, 1879 or 1880, of 122 shares, (the par value stated in inventory is $100, should be $50,) about $3,650, I think those are all, if I am not mistaken.

Q. 520. How about the 625 shares of Chesapeake & Idaho Mining Company stock and the 6,114 shares of the Norfolk & Ouray Mining Company's stock; when were these purchased, at what price, and by what funds?

A. I do not remember when they were purchased nor what they cost; I know very little about them.

Q. 521. Is your only knowledge about them correctly stated in your answer to the plaintiff's amended bill?

A. What knowledge I had regarding these stocks at the time of filing the answer is correctly stated. Since that time I have found some receipts in regard to the Norfolk & Ouray, but that company has failed, and the stock is of no value, and I know very little about it.

Q. 522. State in round numbers about what you think you paid for that Norfolk & Ouray stock, as your books shows nothing about it?

A. I really do not know. I understand that it averaged from $10 to $15 per share.

Q. 523. Examine the last entry on your last cash tickler, marked L, under date of April 2, 1885, and say what was the cash balance on hand at the commencement of business on that morning, as shown by that entry?

A. The balance, as shown by that entry, is $555.275.58. All the entries for the sale of stocks to the Exchange National Bank had not been made at that time.

Q. 524. Of what was that cash balance composed?

A. It was chiefly composed of amounts paid for real estate improvements, amounts paid for the purchase of real estate and stocks, amounts paid for various expenses, paid in merchandising and our farming business, amounts paid for material and labor in building the wharf and improvements that now composes part of the property of the Seaboard Cotton Compress Company. I mean the part in Portsmouth. Amounts drawn by the several members of the firm from time to time.

Q. How much of it was actual money, *cash in hand?*

A. About $5,000 or $20.000, I think. I had given the Exchange National Bank the bulk of our actual money a few days previous to our suspension.

Q. 526. How much was it?

A. I do not remember exactly, but I think it was from $20,000 to $50,000.

Q. 527. This does not appear on your pass book, does it?

A. Only a little of it appears on the pass book.

Q. 528. Then you were carrying as cash all these items of expense, long before incurred, for the various kinds of business you were conducting?

A. Yes, sir; these items were contained in this cash balance.

Q. 529. Please see your late clerks, Mr. Maupin and Mr. Atkinson, and, if possible, produce any book, account or memorandum either kept by you privately or with their assistance, or as one of your firm's books, showing the exact items composing this large cash balance of April 2d, 1885, $555,275.58, will you?

A. I will endeavor to comply with your request.

This examination adjourned to Monday morning, March 15th, at 10 o'clock.

CHAS. T. BARRY,
Special Master.

MONDAY, March 15th, 1886—11 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; H. D. Bulkley, expert; Richard Walke, counsel for trustess; R. T. K. Bain, witness.

Q. 530. Have you found any book, account or memorandum giving the information asked for in question 529?

A. Here witness hands the Special Master a book, and which book is now marked "Exhibit X X, M'ch 15, '86; C. T. B.," by the said Master.

Q. 531. When and where did you find the book and what is it, and what connection has it with the cash balance shown on hand by your tickler "L" for April 2d, 1885, to wit, $555,273.58.

A. I got it from the office of the trustees; it is the book used by the teller in settling his daily cash, and enters into the work used in the settlement of the balance as alluded to on tickler "L."

Q. 532. Show how this appears; explain the items and arrive at the balance shown by your tickler "L" for April 2d, 1885?

A. The balance as shown by the teller is shown on the other settlement book required by and placed in the hands of the Master some two or three weeks ago.

Q. 533. We want the exact items composing the cash balance of April 2d, 1885; will you have a statement thereof made and produced to the Master as soon as possible?

A. I will endeavor to do so, sir.

Q. 534. Was any of the cargo of guano "Ex Mount Edgecomb" in your hands on the 6th day of April, 1885; if so, where was it stored?

A. I think there was about 30 or 40 tons of that stored at the Seaboard Cotton Compress Company.

Q. 535. Was that intended to be conveyed by your deed of April 6, 1885?

A. My deed intended to convey all my property; there was storage due on this guano, and the receiver of the Exchange National Bank held it as his property.

Q 536. What has been done with that remnant of guano?

A. I think the receiver took charge of it.

Q. 537. Don't you know how it was applied in a settlement recently had between your trustees and the Seaboard Cotton Compress Company?

A. Mr. Old told me he was in negotiation for a settlement of it, and, if I mistake not, he said it was contemplated to turn it over to that company or to Mr. Peters.

Q. 508. To be applied how?

A. I think it was intended to be applied to the making up of an amount of guano sold by the Compress Company to Mr. Upshur.

Q. 538. Were not about 310 bags of guano "Ex Mount Edgecomb" applied to replace 323 bags Peruvian guano which had been taken by Bain & Bro. from a lot belonging to the American Fertilizing Company, C. L. Upshur, president, which had been on storage with the Compress Company before your failure; is that what you mean?

A. I do not know; if it was so applied it was done by Mr. Peters.

Q. 539. And you were not consulted about it, were you, by your trustees?

A. Mr. Old made inquiry of me about all property stored with or in the hands of that company, and I gave him such information as I possessed.

Q. 540. You had used about 323 bags belonging to the American Fertilizing Company, though, had you, before your failure?

A. I had not.

Q. 541. Nor had any conversation with C. L. Upshur about having used guano from that company's pile, had you?

A. When the guano was used from their pile it belonged to the Seaboard Cotton Compress Company, and was used by their permission.

Q. 542. At what hour on April 2d, 1885, did Bain & Bro. and the Exchange National Bank close their doors and cease business?

A. I think it was about 10 or 11 o'clock A. M.

Q. 543. From the 2d to the 6th day of April, 1885, where were you and how were you occupied?

A. I was at my residence in Norfolk county; my time was occupied principally in receiving citizens who had money deposited with Bain & Bro. and committees from the meetings of the depositors which were being held from day to day.

Q. 544. Who were present the greater part of the day time at your house near Portsmouth, Va., with whom you were in consultation about your affairs between April 2d to April 6th, inclusive?

A. T. J. Kirkpatrick, W. H. Parrish, John G. Wallace, W. W. Old, John Ott; I think that is all, and citizens were calling almost every hour of the day.

Q. 545. For whom was T. J. Kirkpatrick there as counsel and adviser?

A. I think that he was there at the request of W. H. Parrish.

Q. 546. And whom did W. H. Parrish represent?

A. He represented himself: he was the manager of the Richmond Cedar Works.

Q. 547. And for whom was W. W. Old there as counsel and adviser during those four days?

A. He was there at my request as my counsel.

Q. 548. Do you mean to say that he was counsel for Bain & Bro. or only for you individually?

A. For Bain & Bro.

Q. 549. Did you acquaint him with the crisis then impending and inform him of your indebtedness and insolvency?

A. He advised us in the crisis then upon us.; I informed him of our insolvency and indebtedness and our wishes in regard to an assignment.

Q. 550. Did you then give him as full knowledge of your assets and liabilities as you possibly could at that time?

A. I explained to him that I had given to the Exchange National Bank what I considered their full proportion of our assets and explained to him my wishes in regard to that contained in the deed of April 6th, 1885. My object was to distribute my property and assets equitably in my judgment, so that my depositors would receive an equal share after taking into consideration what the Exchange Bank had.

Q. 551. Then you discussed with him very fully your condition and all the equities between you and your creditors in this case?

A. I informed him of my wishes in the matter.

(Note of Richard Walke as counsel for the trustees.)

Counsel for the trustees here object that question No. 551 is wholly unwarranted by witness' previous answer.

Q. 552. Did you inform him fully of all the equities in your judgment existing between your creditors and yourself?

Counsel for trustees here object to this question on the ground that it does not call for facts, nor seek to elicit facts, but is based upon inferences and that legal inferences.

A. I informed him of what I desired to do with the remainder of my

property, and I think I told him that in my judgment such disposition was as fair and just as I could make, and that the Exchange Bank had in my judgment fully as much if not more as then remained for my depositors, the said deposits amounting to about $900,000.

Q. 553. For instance, did Mr. Old know at that time of your official relations with the Exchange National Bank, and that of each member of your firm?

A. I have fully answered this in answer to a previous question, I suppose he did.

Q. 554. Dont you know he did?

A. 1 dont know how I could know it. I never told him nor did he ever tell me, but I supposed everybody in town knew it, pretty much.

Q. 555. And do you say now that you did not during the four days from April 2nd, to April 6th, 1885, inclusively, in which you were consulting with Mr. Old now one of the trustees, mention the fact that you and James G. Bain were directors and stock-holders of the Exchange National Bank or that Geo. M. Bain, Jr. was Cashier of said Bank?

A. I did not that I am aware of.

Q. 556. Is it probable that you did?

A. I think not.

557. Why is it probable that you did not?

A. I had no occasion to mention it that I know of.

Q. 558. Was not the fact of you indebtedness to the Bank some occasion for your mentioning it to him?

A. You seem to loose sight of the fact that I owe my depositors in Portsmouth and Norfolk County and surrounding country nearly one million of dollars: that their claim was most meritorious; that they had had nothing; that I had already given the Exchange Bank the great bulk of my Bills Receivable and stocks and bonds and that what was left was but a small pittance for my depositors, so that entertaining such views I cannot say that there was any occasion for mentioning it.

Q. 559. Is it probable that you concealed the fact from Mr. Old of your official relations with the Bank?

A. I concealed nothing.

Q. 560. Then you revealed it to him did you?

A. I have given you all the information I possess in regard to it.

Q. 561. Who drew the deed of assignment of Bain & Bro. and where was it drawn, executed and acknowledged?

A. W. W. Old drew the deed of assigment. It was drawn at my residence in Norfolk County, Virginia, and executed and acknowledged as appears on the document itself.

Q. 562. Who drew the deed of Wallace & Son to Bain & Bro., Exhibit No. 1 with plaintiff's bill, and where was it drawn and executed?

A. W. W. Old drew the deed. It was drawn and executed at my residence in Norfolk county.

Q. 563. Where did Wallaces then reside?

A. At Wallaceton, Norfolk county, Va., about 10 miles distant from the city of Portsmouth,

Q. 564. Where do they live now?

A. At the same place.

Q. 565. On what day was the deed of the Wallaces executed and delivered, where and to whom was it delivered?

A. The deed will say. I think it was on the 6th day of April. I don't know to whom it was delivered. It was signed at my house.

Q. 566. Was it given to you or either of your brothers?

A. I do not think it was.

Q. 267. Was it executed the same day that you made your assignment?

A. I think it was.

Q. 568. Under whose advice was the Wallace deed executed?

A. It was done by them. I don't know of anybody's advising them.

Q. 569. What caused them to do it?

A. Because they owed Bain & Bro. the money.

Q. 570 And Bain & Bro. required them to give the deed, did they?

A. I don't know that there was any requirement. They did it of their own free will.

Q. 571 Were either of your brothers present with you while your counsel was preparing the deeds?

A. I do not think they were.

Q. 572. Then you devised and controlled the scheme of distribution as mentioned in the deed, did you?

A. The deed was submitted to and explained fully to them before they signed it.

Q. 573. But did they know what the scheme of distribution was until after you had signed it?

A. I do not know that they did; I think it likely my brother James did.

Q. 574. Did your brother George know of it?

A. I do not think he did.

Q. 575. Did he change the scheme in any way; if so, say how he changed it?

A. The deed was changed as appears by the note at the foot.

Q. 576. And was this done after you had signed it?

A. Yes, sir.

Q. 577. At what hour on the 6th of April, 1885, was your said deed carried away from your house?

A. I don't remember seeing the deed after I signed and acknowledged it. My impression is that it was carried to the clerk's office about 10 o'clock P. M. or later.

Q. 578. Carried there by whom?

A. I do not know; I think Mr. Cassell or Mr. Old.

Q. 579. And are you quite sure that you did not see the deed again after you had signed and acknowledged it?

A. I do not think I saw the deed after I had signed it and it was acknowledged by my wife and myself. After the addition at the foot of the deed after it was altered at George M. Bain's residence the notary came back to my house and took the acknowledgment of myself and wife over again, ("I saw it then,"—added March 19, 1886.)

Q. 580. Who owned the Portsmouth Daily Times newspaper at the time of your failure?

A. Bain & Bro.

Q. 581. Did you have any notice on or before the 6th day of April, 1885,

that meetings of the depositors of the Exchange National Bank, as well as of your own depositors, were being daily held in Norfolk and Portsmouth respectively?

A. I read it, or heard it read in the paper, I think.

Q. 582 Did any committee of the depositors of the Exchange National Bank wait on you or your firm about that time asking that you secure your large indebtedness to the Exchange National Bank?

A. Not that I remember of.

Q. 583. Did counsel for the Exchange National Bank appear frequently from the 2d to the 6th of April, 1885, and urge you or your brother Geo. M. Bain, Jr., to secure the said indebtedness in your then contemplated deed?

A. No, sir; not on me.

Q. 584. On whom did the counsel for the bank, Mr. Alfred P. Thom, wait and urge such request?

A. Mr. Thom was at the residence of my brother, Mr. George M. Bain, Jr., two or three times on the 6th day of April, 1885. He also called at my residence the week previous; I do not remember the exact day—probably Friday or Saturday evening. No request was urged of me; I don't remember exactly what he said; he was there but a very few minutes—I mean at my house.

Q. 585. For what purpose did he say he came to see you?

A. I do not remember, but I know of no other business to call him there but in connection with the bank.

Q. 586. Tell all you remember about that interview with Mr. Thom, counsel for the bank?

A. I do not remember anything he said.

Q. 587. Did you express your determination to anybody, while you were contemplating your said deed of trust, to secure only the depositors of Bain & Bro.?

A. Not that I remember of.

Q. 588. Did Mr. Joseph A. Parker come to your house or converse with you during those four days?

A. He was there, several times, I think.

Q. 589. Did he receive from you the assurance that you would suffer your right arm to be torn from your body before you would deed away any of your property other than for the use of the depositors in general of Bain & Bro.'s bank in Portsmouth?

A. Not that I remember of; a committee called on me and informed me that they understood that we intended to deed away all we had to secure the Exchange National Bank and leave them (my depositors) without anything. I gave them most positive assurance that it would not be done.

(NOTE—The Master is requested to hand the witness the issue of the Portsmouth Daily Times for Saturday, April 4th, 1885, here produced, and this being done, witness takes said newspaper.)

Q. 590. Do you recognize this newspaper; is it the issue of the Portsmouth Daily Times for April 4, 1885, then owned by Bain & Bro.?

A. I do, and think it is.

Q. 591. Please look in the local column on the first page of said newspaper, containing a report of the proceedings of a meeting of the depositors of Bain & Bro. held at 2 o'clock P. M. on April 3d, 1885, and examine a paragraph reading as follows: "On motion, Mr. Joseph A. Parker addressed the meeting. He stated that he had seen Mr. R. T K. Bain, who said that he would suffer 'his right arm to be torn from his body before he would deed away any of his property other than for the use of the depositors in general of Bain & Bro.'s bank of Portsmouth.'" Say whether he correctly reported you in making that statement?

A. So much of said report as is at variance with my answer to question 589 is incorrectly reported; I do not remember of Mr. Parker's coming to my house alone any time previous to April 6th, 1885.

Q. 592. Now say if you can deny using the language reported by Mr. Joseph A. Parker to that meeting, and do you deny it?

A. I do not deny using a part of that language after the word property. I do not remember using those exact words.

Q. 592½. Now look at the paragraph immediately following Mr. Parker's, which reads as follows: "Mr. P. O'Connor also addressed the meeting and said 'that he had also seen Mr. Bain, who told him in substance what Mr. Parker had stated.'" Is Mr. O'Connor correctly quoted?

A. The answers heretofore given in reply to questions regarding Mr. Parker on the same subject are here reiterated in reply to this question. The fact of Mr. O'Connor's substantiation would seem to show that it was a committee, I think. Still I think it makes no difference whether they called in person or as a committee.

Adjourned to Tuesday, March 16, 1886, 10 o'clock A. M.

CHAS. T. BARRY,
Special Master.

TUESDAY, March 16th, 1886—11 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; Richard Walke, counsel for trustees, and R. T. K. Bain, witness.

Q. 593. Explain what you mean in your answer to question 518 by the expression "Came through the clearing house," as used by you there?

A. I meant that they were deposited at the banks where the parties kept their accounts, and that I thought they came to us in the clearing house settlements.

Q. 594. Through the Exchange National Bank?

A. We made our clearing house settlements through that bank.

Q. 595. In the manner described in your answers to questions Nos. 474 to 480, inclusive, is that so?

A. Yes, sir; I think that explains it.

Q. 596. Explain what you mean in your answer to question 558, by the words there used, to-wit: "I had already given the Exchange National Bank the great bulk of my bills receivable?"

A. I meant that they had the great bulk of the bills receivable of Bain & Bro.

Q. 597. How did they get them?

A. They were discounted by them.

Q. 598. And you got the money for them, did you?

A. The proceeds of the discount went to the credit of Bain & Bro.

Q. 599. Did these increase or diminish your indebtedness to the said bank?

A. I think it had the effect in some cases of decreasing our direct indebtedness.

Q. 600. And in other cases what effect did it have?

A. It had the effect of renewing or relieving other indebtedness.

Q 601. I am speaking now of rediscounted bills receivable, which you say in your answer to the plaintiff's amended bill you had rediscounted to the exact amount of $593,251.99; do you mean to say that at the time of your failure, if you had not rediscounted this paper at the Exchange National Bank, you would have owed the said bank more money than you now do?

A If my own paper had been discounted instead of the rediscounting of these bills receivable, then I think my direct indebtedness to said bank would have been greater.

Q. 602. For instance, say on the 30th of March. 1885, you were indebted on your own paper, as appears by the books of the bank, in the amount of $550,000, were you not also liable as endorser on these $593,251.99 of bills receivable?

A. I should think so.

Q. 603. You say you owed your own depositors about $1,000,000, and about the same amount to the Exchange National Bank, how do you account for having only what you term a "pittance" to leave to your depositors?

A. I owed my depositors in Portsmouth, Norfolk county, and surrounding country about $1,000,000, and that the Exchange National Bank had nearly all of my bills receivable and my stocks and bonds which I felt was her full share and that very little remained, except my real estate, for my depositors.

Q. What was your plan of utilizing all your real estate for your depositors?

A. I do not understand fully your question.

Q. 605. Say what you do understand by it and answer accordingly?

A. I do not see how I can give an intelligent answer to a question I do not understand.

Q. 606. Does your deed of assignment to your said trustees indicate to

your mind any plan for utilizing all your real estate for the benefit of your depositors?

A. It provides that those secured under the second class shall have the privilege of paying for any property purchased at public auction by using the amount due to them at its full face value, This was done to place the parties to whom this money was owing on an equal basis with outside parties.

Q. 607. Did it place the depositors themselves on an equal footing?

(Question objected to by counsel for Trustees as seeming to involve the legal effect of the deed, which is a question of argument and construction.)

A. I think it did.

Q. 608. Explain how it did this?

(Question objected to by counsel for trustees for same reason as given above.)

A. Where property is put up at public auction every depositor as well as every other party secured under the second class, had a right to bid on it.

Q. 609. Are the pieces of property, stocks, bonds or other purchases mentioned by you in answer to question 518, or to other parts of your deposition, as having been paid for in the manner described by you, all the property that you can now remember as having been purchased by Bain & Bro. with the moneys obtained from the Exchange National Bank. If not, disclose whatever else you may know now about such property.

A. I have given you all the information that I can remember in regard to that property and cited you to such of it as seemed to come through the clearing house.

Q. 610. Is there anything else material to this examination or of benefit or advantage to either party here represented that you desire to state, or of which you have knowledge?

A. There is nothing that I am aware of.

And counsel for plaintiff here says that he has finished the direct examination.

CHAS. T. BARRY,
Special Master.

Cross-examination by Richard Walke, Esq., who appears solely for the trustees of Bain & Bro.

X-Q. 1. Please state how long the firm of Bain & Bro. were engaged in the banking business in the City of Portsmouth, Va.?

A. About twenty years.

X-Q. 2. State what or about what was the amount due by that firm to its depositors at the time of its failure.

A. About $900,000, not including the deposits due to the Richmond Cedar Works.

X-Q. 3. And how had that deposit account been running, that is to what amount for years prior to the failure?

A. It had been running about that amount for years previous to our failure.

X-Q. 4. And do I understand that there was about an average daily indebtedness for years of that amount to your depositors?

A. Yes sir.

X-Q. 5. And how much cash or funds did Bain & Bro. turn over to the trustees under the deed of assignment?

A. About $20,000.

And now, at 12.50 P. M. the examination adjourned to Wednesday, March 17, 1886, 10 A. M.

CHAS. T. BARRY,
Special Master.

WEDNESDAY, March 17th, 1886—11 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; Richard Walke, counsel for trustees; Legh R. Page, counsel for trustees; H. D. Bulkley, expert accountant; R. T. K. Bain, witness.

Counsel for the trustees declining the further cross-examination of the witness, R. T. K. Bain, said witness takes the testimony heretofore given by him, to read, preparatory to signing the same.

On request of plaintiff's counsel a subpœna was issued for the appearance of George M. Bain, Jr., before Special Master Barry this day, and said subpœna placed in the hands of the marshal for service.

Direct examination of R. T. K. Bain resumed.

Q. 611. Have you prepared a statement of the exact items composing the cash balance of April 2d, 1885, as was requested of you by question 533, in response to which you said you would endeavor to do so. If you have not prepared it, then say by whom were the entries made on the teller's daily cash books, marked respectively X X and X X 1, and from what other books or memoranda were those entries taken?

A. I have not prepared it. I made the promise in good faith, but I find that it goes back over so many years and involves so many transactions both large and small that it is impracticable for me to do it in any reasonable time. You have no idea of the mass of papers that compose

it—bushels. Book X X 1 is kept in the handwriting of W. G. Maupin, Jr., and also book X X.

Q. 612. Look at the work in Exhibit X X 1 and examine the items marked "Sev," $138,722.84, and the last item, marked "M," $597,333.76, on the credit side of the daily cash account for April 1st, 1885, and say what those designations respectively mean?

A. That designated as "M" represents a balance of the teller's settlement of that day. The "Sev" on both sides represents amounts that have been there at sundry times for quite a long period. Some of these on each side are the same items which have been kept on each side instead of being deducted.

Q 613. Name some of the items included under the designation "Sev," which you say are the same on both sides.

A. Gold bought and sold, some items of indebtedness in the shape of checks; there may be other small amounts which appear on both sides which I don't remember. There was some discounts, but I am not sure that they appear on both sides, which would, perhaps, account for the difference between the two amounts, debit and credit. The difference in these amounts belong chiefly, I think to the bills receivable account.

Q. 614. Name the book on which these details appear?

A. The teller's "scratch" and the small books, where items of gold and silver bought and sold daily were kept. Some may be on the stub or pass books of Bain & Bro. in account with the Exchange National Bank.

(The witness after reading over all the foregoing deposition, asks leave to make answer to question 264, which he had heretofore declined to answer, and now does so, as follows, to wit:)

A. On the morning of March 31st, 1885, I was advised that the only thing that could be done with a view of saving the Exchange National Bank was for Bain & Bro. to relieve as much of their indebtedness as possible by disposing of certain stocks and Bonds to the Exchange National Bank, and thus get the bank in shape so that the comptroller of the currency could pass her into voluntary liquidation, and thus allowing time for improvement in her condition, that she might be re-established as a National bank or made a State bank. Anxious to do almost anything in my power to afford assistance to the said bank, I accordingly went to Norfolk, to the office of Tunstall & Thom, where I found the president, Mr. Whitehead. It was then and there Mr. Whitehead ordered the purchase of the bonds, and soon thereafter left. Some time after this I was presented with a writing, a copy of which is in the plaintiff's bill and amended bill, which I signed for Bain & Bro. and R. T. K. Bain, and delivered it to Mr. Thom. After this Mr. Thom took a seat by me and said, as near as I can remember, that he desired me to promise him that in case I made a deed I would not prefer against the Exchange National Bank. I told him I did not think it was right, but he insisted that it was the right thing to do, so, tired and worried, I reluctantly assented. Later in the day it appeared to me that I had made a promise equally binding on my two brothers, and when, after reflection, I realized the fact that by far the greater portion of my bills receivable were held by the

Exchange National Bank, that nearly the entire lot of my stocks and bonds had been surrendered to said bank, together with a one-fifth interest in the Richmond Cedar Works and that hardly anything would remain for my Portsmouth depositors in case of an assignment, I felt that I had consented to a promise which I could not in justice, in equity or conscience adhere.

Witness also desires to alter the answer to question 111 of his deposition and to have it read as follows: "I believe they contain part of the Bain & Bro. account with the Exchange National Bank "

Also witness desires to add to his answer to question 510 the following words: "I think that only one-half of these notes still remains unpaid."

Also witness desires to add to his answer to question 579: "I saw it then."

And the witness, having read over all of his deposition and made such additions and alterations to his said answers as he desires, now signs the same and makes oath that the same is true and correct."

ROB. T. K. BAIN.

Subscribed and sworn to before me this 19th day of March, 1886.

CHAS. T. BARRY,
Special Master.

The witness, having now fully testified in obedience to a summons in behalf of the plaintiff, desires here to protest that no fact or information as to his dealings with the Exchange National Bank of Norfolk, obtained by this examination, shall be used, either directly or indirectly, against him or others in the criminal proceedings now depending in this Court against him and others; the said examination having been directed to matters almost wholly irrelevant to the issues before the Master, and in large part personally conducted by one H. D. Bulkley, whose name is endorsed upon the indictments in said criminal proceedings as a witness for the United States, and who is now in the employ and pay of the plaintiff as an expert accountant.

And further this deponent saith not.

ROB. T. K. BAIN.

NOTE BY COUNSEL FOR PLAINTIFF—In reply to the statement filed by R. T. K. Bain at the end of his deposition, counsel for plaintiff says: That this examination is made by the Master and these depositions taken before him in strict accordance with the decree of the Court in this cause entered

on the eleventh day of November, A. D. 1885, and not with the view or purpose to elicit any matter to criminate or prejudice the witness in any indictment pending against him or others. And the Master is requested to note the fact that the expert accountant, Mr. H. D. Bulkley, has not personally conducted this examination in any sense, and that the said expert was in fact absent from this city from the 13th day of February, 1886, to the 11th day of March, 1886, during all which period the examination of R. T. K. Bain, the witness, was proceeded with daily by the plaintiff's counsel in the same manner as throughout the whole deposition; that said expert, during the few days he was present in February, and from the 11th to the 17th day of March, 1886, has aided the plaintiff's counsel and the Special Master as allowed by the said order in examining the books of Bain Bro. and comparing them with the facts obtained by him from the books of the Exchange National Bank in the very careful examination thereof made by him, the said expert, during the summer of 1885, to wit, from the 8th day of June to the 13th day of August, 1885.

T. S. GARNETT,
of Counsel for Plaintiff.

MARCH 17TH, 1886—2:15 P. M.

And now George M. Bain, Jr., who, having been duly subpœnaed, appears before the Special Master. And thereupon Legh R. Page, counsel for trustees, offers and makes the following request, to-wit: That the Master direct Mr. H. D. Bulkley, who, they are informed by plaintiff's counsel, is to be a witness before the Master upon the matters now at issue, to withdraw from the room and remain absent while the witness now called is under examination.

To which request counsel for plaintiff replies that Mr. H. D. Bulkley, the expert accountant, is present before the Master pursuant to the terms of the order entered in this cause on the 11th day of November, 1885, and this examination cannot be made intelligently or accurately without his aid and presence.

The Master declining to direct as requested by counsel for trustees, the said witness was duly sworn and deposed as follows, to-wit:

To question 1—

Q. 1. State your name, age, residence, and occupation?

A. George M. Bain, Jr.; age, 60 years; residence, Portsmouth, Va.; occupation, I have none.

Q. 2. Are you one of the defendants in the cause of Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, against Bain & Bro. and their trustees, now pending before this court?

A. I am.

Q. 3. Were you the cashier of the said Exchange National Bank continuously from the 8th day of July, 1870, to April 2d, 1885?

A. I think I was.

Q. 4. How long were you a member of the firm of Bain & Bro., who were your partners and where was their place of business?

A. I don't exactly recollect; I think about 18 or 19 years. My partners were R. T. K. Bain, James G. Bain, Thomas A. Bain and myself. Their place of business was in Portsmouth, Va.

Q. 5. Which one of your partner's gave most attention to the firm business in Portsmouth after you became cashier of the Exchange National Bank?

A. My impression is that the business was divided between the other three. Mr. Robert Bain may have given the most attention to it, but they were all attentive, as far as I know.

Q. 6. Where were you chiefly occupied during the existence of your late firm.

A. At the Exchange Bank.

Q. 7. Are you familiar with the books of account of Bain & Bro.?

A. I haven't had anything to do with them for fifteen years.

Q. 8. Prior to that time does your handwriting appear in the entries and figures on the said books?

A. Probably they do.

Q. 9. For the past fifteen years did you inspect or examine the said books from time to time?

A. I did not. I had no time to do it.

Q 10. Do you know or not what system of bookkeeping was used by your firm. If so, describe it?

A. I don't know that I can.

Q. 11. Do you know whether your firm books were correctly kept or not?

A. I believe they were.

Q. 12. Do you know it?

A. I have had nothing to do with them for fifteen years, and don't see now I can know it. I tell you I believe it.

Q. 13. Are you a practical bookkeper and have you been familiar with accounts and bookkeeping for many years past?

A. I have. I have kept books.

Q. 14. Explain how your firm kept your account with the Exchange National Bank of Norfolk.

A. I can't do it. I never saw it

Q. 15. What accounts did Bain & Bro. keep on their books showing their investments from time to time in real and personal property?

A. I don't know; I never saw it.

Q. 16. Did you know at the time of your failure what was the condition of your firm's investments in real, personal and mixed property?

A. I don't know that I did. I don't know now.

Q. 17. Can you specify any firm property either real or personal purchased by your firm since the 8th day of July, 1870?

A. No sir. I don't think I can.

Q 18. Were you consulted by your partners in regard to the purchases of firm property. If so, specify in what instance?

A. I don't recollect of any since I was cashier of the Exchange National Bank. There may have been but it has escaped my recollection.

Q. 19. Do you know anything about the investments made by Bain & Bro. since 1870 in real and personal estate?

A. I know that they made them, but I can't specify them.

Q. 20. Do you know how the title to the firm's real estate was taken? If so, say how. And was this done with your consent and approval?

A. It was taken in the names of the individual members, I think, sir, for convenience in case of selling it. I made no objection to it and had absolute confidence in my brothers.

Q, 21. Did all these purchases appear on the books as firm property?

A. I told you I had no knowedge of the books, but I suppose they did.

Q. 22. Did Bain & Bro. sell much real estate?

A. I am not able to say.

Examination adjourned to Thursday, March 18, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

THURSDAY, March 18th, 1886--10:30 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; Legh R. Page, counsel for trustees; H. D. Bulkley, expert accountant; George M. Bain, Jr., witness.

Q. 23. On what date did you become a member of the firm of Bain & Bro.?

A. I don't recollect.

Q. 24. In what year was it?

A. I don't recollect that.

Q. 25. What was the amount of capital stock of Bain & Bro. at the time you entered the firm?

A. I think the capital stock was $5,000; I think the firm had more money than that, perhaps, not put in as capital.

Q. 26. Did they keep a capital stock account on the books?

A. I think it was to the credit of James G. Bain and R. T. K. Bain individually.

Q. 27. Did the books show any amount carried as capital stock account?

A. Not otherwise than to their credit, as I am aware of.

Q. 28. Did those individual accounts show that the capital stock was just $5,000?

A. It may have been more than $5,000 to their credit; I don't recollect now.

Q. 29. Were there any articles of co-partnership of the firm of Bain & Bro.?

A. No; I think not.

Q 30. Did you contribute anything to the capital stock of Bain & Bro. when you entered the firm?

A. I did not.

Q. 31. Did you give much of your time and attention to the management of the business?

A. When I was there I did.

Q. 32. Explain what you mean by that?

A. I mean until I left there to come to Norfolk I did.

Q. 33. Do you mean that after you were made cashier of the Exchange National Bank you did not give much of your time and attention to the management of the business of Bain & Bro.?

A. I do.

Q. 34. You say you placed no capital in the firm: what service, then, did you render to your firm?

A. Whatever I could.

Q. 35. Did you visit your place of business in Portsmouth regularly; if so, say for what purpose, and how often?

A. Well, I have been engaged at the Exchange National Bank sometimes as late as 10 and 11 o'clock at night, and seldom got away before 6

o'clock in the evening; if they were open when I went over I stopped in; if not open, I did not.

Q. 36. Was it your general rule to get in your banking house in Portsmouth every evening, and for what purpose?

A. No, it was not my general rule; I couldn't get in when they were closed, and my object was merely to stop in.

Q. 37. Was it your habit to take with you from the Exchange National Bank certain papers for Bain & Bro. nearly every day; if so, what were those papers?

A. Deposits were made for them at the Exchange National Bank, and I carried over or sent them over; if they were closed I sent them over the next day.

Q. 38. Could you have had access to the banking house of Bain & Bro. and their books and papers at any time you desired it?

A. I suppose so.

Q. 39. Please explain how you kept the account of Bain & Bro. with the Exchange National Bank on the books of said bank?

A. They had an individual account on the individual ledger, and they had an account on the general ledger, and the deposits of checks were kept on the individual ledger, and their bills receivable, collection and bills payable were charged up on the general ledger.

Q. 40. Were these the only accounts kept by the Exchange National Bank with Bain & Bro.; if not, name another?

A. Those are the only accounts kept on the books; they had a daily settlement with the teller.

Q. 41. Is that all?

A. I think so.

Q. 42. Are you sure of it?

A. I am not positively sure of anything in this world; they are all that I recollect.

Q. 43. Were you familiar with their accounts at the said bank?

A. I tried to keep a general run of all the accounts of the bank, and among them theirs.

Q. 44. Did you not endeavor to keep a better run of that account of Bain & Bro. than of almost any other?

A. No, I think not.

Q. 45. What was the name and style of Bain & Bro.'s account as kept on the general ledger of the bank?

A. Bain & Bro.

Q. 46. Any other designation?

A. Not that I know of.

Q. 47. How was it designated on the individual ledger?

A. Bain & Bro.

Q. 48. Was the mode of keeping Bain & Bro.'s accounts devised by you, and were they kept under your direction and supervision?

A. The whole bank was under my supervision; the general ledger account was opened for convenience.

Q. 49. Did you have an account on the bank's books styled "Bain & Bro.'s pro forma account?"

A. No, sir; the pro forma was charged upon that general ledger account.

Q. 50. Explain what you mean by the word "pro forma?"

A. A description of a piece of paper.

Q. 51. Whose paper did this represent?

A. Any paper sent to Bain & Bro. for collection.

Q. 52. Can you not without further question state in narrative form what the pro forma account embraced as to Bain Bro.'s transactions; please do so?

A. The paper discounted for them.

Q. 53. Do you mean their own paper without other endorsement or security as well as the rediscounted bills receivable?

A. Yes; but I always had security.

Q. 54. Did you always have on Bain & Bro.'s own paper any other endorsement than their own firm name?

A. No; collateral.

Q. 55. To what amount were you carrying during the latter years of the bank's existence Bain & Bro.'s own paper, endorsed only by that firm; I mean at any one time?

A. I don't recollect.

Q. 56. Say for instance, on the 30th of March, 1885.

A. I think it was then some $800,000.

Q. 57. And on the same date, how much in amount of rediscounted bills receivable endorsed by Bain & Bro., the proceeds of which had gone to their credit at the bank?

A. I don't know.

Q. 58. Is the amount correctly stated on page 2 of your printed answer to the plaintiff's amended bill in this cause; say what that amount is?

A. $593,251,99; I believe that is correct; I have no reason to doubt it.

Q. 59. Now, take for instance, these thirteen several notes of Bain & Bro., dated as follows, the amounts being each $25,000, to-wit: November 29, 1884, $25,000; December 5, 1884, $25,000; December 10, 1884, $25,000; December 16, 1884, $25,000; December 23, 1884, $25,000; December 23, 1884, $25,000; January 3, 1885, $25,000; January 8, 1885, $25,000; January 14, 1885, $25,000; February 19, 1885, $25,000; February 19, 1885, $25,000; February 26, 1885, $25,000; February 26, 1885, $25,000, all dated at Portsmouth, Va., and payable at the National Park Bank, New York, made by Bain & Bro. payable to their own order, and endorsed Bain & Bro., all except one payable six months after date, are now held by the plaintiff in this cause, examine the said notes, say in whose handwriting each of them is drawn, signed and endorsed, and whether the same were discounted at the Exchange National Bank of Norfolk; if so, about what date, at what rate of discount, to whose credit did the proceeds of discount go, and on what security were the same so discounted?

A. They are all drawn by Mr. Robert Bain except one, signed by Mr. Robert Bain, all but one, endorsed by Robert Bain. I think they were discounted at the Exchange National Bank. I can't tell what date. I can't say what rate of discount. The proceeds of the discount went to

credit of Bain & Bro., and were discounted on security of the general collaterals that I held.

Q. 60. By whom and in whose handwriting is the one note you have excepted in your above answer drawn, signed and endorsed?

A. In mine.

Q. 61. What is the paper or memorandum affixed to each of said notes except one?

A. A pro forma.

Q. 62. Were such notes as these continuously carried at said bank for Bain & Bro. for several years prior to your failure?

A. Yes, sir.

Q. 63. When such notes fell due how were they usually taken up?

A. By checks.

Q. 64. Checks on what?

A. On the Exchange Bank.

Q. 65. On the proceeds of what?

A. On what was to to their credit, or on other discounts.

Q. 66. Were these said check when so drawn always good or not?

A. If not, they were required to be made good.

Q 67. Was this requirement complied with and how?

A. Yes, either by money or by discounting paper.

Q. 68. Now state particularly and in detail all the good securities for the payment of Bain & Bro's constant indebtedness, which were actually in your hands as cashier of the Exchange National Bank, at the time you diecounted the said paper of Bain & Bro, mentioned in your answers to questions 56 and 58 of this deposition, to wit; to the extent of $800,000 of their own paper and re-discounts of $593,251.99?

A. Well, I knew I controlled all of their stock in the Exchange Bank, which I considered worth at least $200,000. I held their stock in the Seaboard Cotton Compress Co. amounting to $300,000,a company which earned over 40 per cent in three years, and which I considered worth vastly more than it represented. I had $200,000 worth of bonds of the Meherrin Valley Railroad covering property in the construction and equipment costing as much or more than that, and $140,000 of Southern Telegraph bonds, I think, and the bills receivable I considered good by themselves and by the makers and endorsers.

Q. 69. Is there anything on record on the books of the bank to show that the bank held the above securities or any of them as pledged for the payment of your firm's indebtedness to the bank? If so, show it.

A. There may not be any record but it is a fact that I held them.

Q 70. Name the date when you got them as such security?

A. I held them from the time they were issued; I don't recollect the date.

Q. 71. Say, for instance, at what date the Southern Telegraph bonds, $140,000 in face value, came to your hands as cashier of said bank?

A. I don't recollect.

Q. 72. Say again, when the Meherrin Valley Railroad bonds, $200,000 in face value, came to your hands as security for your firm's debts to the bank?

A. As soon as they were issued.

Q. 73. When was that?

A. I don't recollect.

Q. 74. How was the stock of the Exchange National Bank pledged as security with you for your firm's debts to the bank, and what have you to show it?

A. I stated I controlled it; it could not be transferred without my knowledge and consent, and the certificate itself recites it.

Q. 75. Was not that the only way in which it was held as security?

A. It was understood by the firm of Bain & Bro. that it was bound for any indebtedness; there was no other form of pledge, I know; I controlled it.

Q. 76. What evidence is there other than your memory that the stock of the Seaboard Cotton Compress Company was liable for the payment of Bain & Bro.'s indebtedness?

A. My possession of it as cashier of the bank.

Q. 77. Was it at any time prior to your failure duly assigned or endorsed to the bank as such security?

A. I don't know that it was formally assigned, but I knew I held it; it is a fact that the bank held it as collateral.

Q. 78. Don't you know that it was not so endorsed until after the bank's failure?

A. Yes, sir.

Q. 79. And do you now assert that all these securities mentioned in your answer to question 68 were in your possession as cashier of the Exchange National Bank as lawfully pledged at the time the bank discounted the $800,000 worth of notes of Bain & Bro. and the $593,251.99 of rediscounted paper for the payment of Bain & Bro.'s debts to the bank?

A. I assert that they were in my possession as cashier of the Exchange Bank, or under my control, so far as issued.

Q. 80. Now say if these securities were in your hands as cashier in the usual mode adopted by you in taking security from other customers of the bank generally?

A. Well, there was some exceptional cases.

Q. 81. And this was one of them, was it?

A. Yes.

Q. 82. Now give the market valuation of the stock of the Seaboard Cotton Compress Company and the bonds of the Meherrin Valley Railroad at the time you took them?

A. I don't know what you mean by market value; what do you mean by market value?

Q. 83. I mean that you should state what those two stocks and bonds would bring in what you as a banker term "the open market?"

A. Well, there was no market for them. I took those two properties on what I knew to be their intrinsic value. The intrinsic value of the Cotton Compress Company stock I considered 50 per cent. above its face value. I estimated that the property covered by the Meherrin Valley Railroad bonds was worth the amount of the bonds outside of the franchise.

Q. 84. Were Bain & Bro. largely interested in that speculation known as the Meherrin Valley Railroad Company?

A. I didn't know anything about it until the road was built.

Q. 85. Have you read or seen a copy of the deposition of R. T. K. Bain in this case?

A. He has read some of his notes to me.

Q. 86. Did you take the trouble to find out how much the railroad cost; if so, how much was it?

A. No, I did not. I had some experience in the cost of railroad running to the Compress Company, and from that experience I knew that a railroad twenty miles long, and equipped, couldn't cost less than $10,000 a mile.

Q. 87. Who built the Meherrin Valley Railroad?

A. I don't know; I think Mr. Dill had a great deal to do with it.

Q. 88. Who is Mr. Dill; tell all you know about the Greenville Land and Lumber Company, in which Bain & Bro. were stockholders, and its connection with the Meherrin Valley Railroad Company?

A. Mr. Dill is a resident of Portsmouth, and I don't know anything about the Greenville Land and Lumber Company, except that it was a company, as I understood, with valuable lands and facilities for furnishing valuable lumber.

Q. 89. Then if you knew nothing about the Greenville Land and Lumber Company, why did the bank discount over $100,000 worth of that company's notes with the simple endorsement of Bain & Bro.?

A. I built up the trade of Norfolk by making integrity of character available as capital, and I discounted that paper because I believed in the integrity of the paper.

Q. 90. Is that the security on which you relied in discounting for Bain & Bro.?

A. Certainly not entirely.

Q. 91. Do you know of no connection between the Greenville Land and Lumber Company and the Meherrin Valley Railroad?

A. No, sir; I don't know anything about it.

Q. 92 Do you know whether the affairs of the Greenville Land and Lumber Company at one time became part and parcel of Bain & Bro.'s business?

A. Well, I don't know that I do; I may have heard something about it, but I haven't got it definitely in my mind.

Q. 93. Did you know that your firm claimed to be the largest creditor of that company?

A. I didn't know they claimed it, but I have no doubt it is so.

Q. 94. Then you were not aware of the large dealings of your firm with that company, were you?

A. Only by the paper.

Q. 95. And you were not advised of the investment of funds made by Bain & Bro. in the stock of that company and the enterprise of the Meherrin Valley Railroad?

A. I might have been in its incipiency, but not since; I am not certain of either.

Q. 96. Do you know what your stock in the Seaboard Cotton Compress Company cost your firm?

A. No, sir.

Q. 97. Can you show by any account what it cost, either on your firm's books or any private book of your own; please do so?

A. I cannot; the property speaks for itself and its business.

Q. 98. How did you get your stock in that company?

A. By putting property and improvements in it and investing all the earnings of it for three years and building it up.

Q. 99. How many shares did Bain & Bro. have of its stock?

A. We owned three-fifths of it: capital stock $500,000.

Q. 100. But specify the number of shares issued to Bain & Bro.?

A. Twenty-nine hundred and fifty, I think.

Q. 101. Had you bought any of this stock from C. W. Grandy & Sons; if so, when and what price?

A. Mr. Grandy was to go in as one of the original stockholders. He was to put in $100,000 in money for $100,000 worth of stock. It was a valuable enterprise to the business of Norfolk, as well as to the stockholders. Mr. Grandy thought Mr. Reynolds' property was put in too high. There was a great deal of discussion about it. I was afraid the matter would fall through. Mr. Grandy demanded that his stock should only cost $75,000. I conceded; Mr. Reynolds could not. The company started out with an assured business, while it was supposed other compress companies lost money on their capital. We made 12 per cent. net the first year under the strongest competition. Mr. Grandy then demanded further concessions from Mr. Reynolds. I would not allow Mr. Reynolds to concede. I told Mr. Grandy that Mr. Reynolds could not buy it. I agreed to take it off his hands. Mr. Grandy sold it to me at cost and interest.

Q. 102. Say exactly how you paid Mr. Grandy for this stock; if by check, state its date and amount?

A. I can't do it.

(Mr. Legh R. Page, of counsel for trustees, objects to the above question 102.)

Q. 103. Was it by check on the Exchange National Bank?

A. It is pretty probable.

Q. 103. Was it for your individual or firm account?

A. For the firm account.

Q. 105. What were the Southern Telegraph Company bonds quoted at on the 31st March, 1885?

A. I don't know that they were on the stock board, but I had heard that a party was willing to pay 50 cents for all of them. I had heard them quoted as high as 85, and the sale was made, but not on the stock board.

Q. 106. Were they salable at all in open market on the 31st day of March, 1886?

A. I don't know; the matter was in litigation, but I heard that rival companies were willing to buy at 50 cents.

Q. 107. You say that the Seaboard Cotton Compress Company stock and the Southern Telegraph bonds were all pledged for Bain & Bro.'s indebtedness to the bank, and were so held up to 30th March, 1885; why were

they then sold to the bank for $570,000 worth of Bain & Bro.'s notes and other items of indebtedness on the 31st day of March, 1885?

A. They were purchased by the president of the bank; we were making an effort to save the bank and to get the charter extended.

Q. 108. Could these securities have been sold that day for $570,000?

A. Well, no, I suppose not; at a forced sale, no. You couldn't sell $570,000 worth of property in Norfolk in a day to save your life—not even cotton. But the value was there and could have been made available.

Q. 109. Could you at any time since that day have realized for the bank $570,000 from those securities?

A. I believe I could have made them available for that or more.

Q. 110. Say how?

A. Various ways.

Q. 111. Can you take from the receiver of the bank these stocks now at that price?

A. I am not worth a cent in the world.

Q. 112. Did you guarantee that they would bring that price whenever put upon the market?

A. I did not.

Q. 113. Is the paper set forth in the plaintiff's printed bill a copy of your agreement or of Bain & Bro.'s agreement to guarantee that price for those stocks whenever put upon the market by the bank?

A. I have no doubt that it is.

Q. 114. Why can you not comply with that guarantee?

A. I am not worth a cent in the world.

Examination adjourned to Friday, March 19th, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

FRIDAY, March 19th, 1886—10:45 A. M.

Examination resumed.

Present: Chas. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; Legh Page, counsel for trustees; H. D. Bulkley, expert accountant; George M Bain, Jr., witness.

Q. 115. On the 31st day of March, 1885, where were the South Telegraph Bonds ($140,000) mentioned in your agreement of that date?

A. They were in the Exchange Bank.

Q. 115. Were they there before the agreement was signed, or were they only brought there that day?

A. Well, I am not positive whether they were there before that or not, but I had control of them whether they were there or not.

Q. 117. Mr. R. T. K. Bain in answer to question 267 of his examination said "the Telegraph Bonds were delivered to the Bank the morning of the signing of the agreement of that day, March 31st 1885. Is that true,

if so, where were they before that day, and say how you controlled them, if they were not in your hands?

A. It may be true they were delivered that morning. If they were in their possession, I controlled them, and could have sent for them any moment and had them in the bank. If they were not in the Exchange Bank they were with Bain & Bro. I dont know that there was any writing, I suppose if I had died suddenly it might not have been known, but I think they would have been delivered under any circumstances, living or dying.

Q. 118. Is that what you mean by saying you had security for Bain & Bro's indebtedness to the Bank?

A. Yes, that is what I mean for Bain & Bro knew that I had control of those Southern Telegraph Bonds for collateral.

Q. 119. Were the proceeds of the discount of Bain & Bro's paper ever applied by them to the purchase of any of these securities?

A. Not that I know of. I believe they were purchased out of their current business. I couldn't tell that and I dont believe any man under the sun can?

Q. 120. Do you know then what your firm was doing with the moneys they obtained from the Exchange National Bank; how was it invested?

A. Carrying on their business.

Q. 121. Specify the different kinds of business they were carrying on.

A. Banking, Brickmaking, Lime and Farming.

Q. 122. What else?,

A. They did deal in guano, not merchandising that I know of.

Q. 123. Do you know anything about the purchase of a cargo of guano for Bain & Bro. "Ex. Mount Edgecombe" in February, 1884, or thereabouts if so, say how that guano was paid for?

A. I think there was a cargo of guano bought at that time. I can't tell exactly how it was paid for. There was considerable delay in the arrival of the vessel here.

Q. 124. Say through whom was the said cargo imported, who drew on Bain & Bro. for its payment, and who took up the draft, on or about February 15th, 1884?

A I believe it was imported through a house in New York that was agent for a house in England. The parties who sold it in England drew on Bain & Bro. for its payment. The Exchange National Bank took up the draft and held the document.

Q. 125. Do you know how long after the payment of this draft by the Exchange National Bank it remained in the Bank, and on what account was it carried.

A. I do not. Carried in the Teller's cash. I think in the Receiving Teller's cash.

Q. 126. Please examine the said draft drawn by Robert Norman & Co. heretofore filed marked, with question 238, deposition of R. T. K. Bain, for the sum of $59,725.97, marked also on its face, "Good, Geo. M. Bain, Jr. Cashier" and stamped "Cash," say whether you recognize this as the draft paid by the Exchange National Bank for the guano "Ex. Mount Edgecomb," which you say was carried in the Receiving Teller's cash of

said bank as a cash item, if so, examine it carefully, say when it was paid, by the said bank, and how long it was carried in the cash.

A. I do so recognize it. It was paid 15th February, 1884. I don't know how long it was carried in the cash.

Q. 127. Can't you give some idea how long it was carried in the cash?

A. I cannot.

Q. 128. When and how was it retired from the cash?

A. I don't recollect. There may have been a discount and paid by that.

Q. 129. Look at the statement taken from the books of the Exchange National Bank marked "annexed to question 210," deposition of R. T. K. Bain, showing the discount of $200,000 of Bain & Bro's notes, and say whether this said draft was retired from the cash of the Bank by the proceeds of that discount.

A. This statement says so and I take it to be correct.

Q. 130. Did Bain & Bro pay the Bank interest on that draft so carried from February 11th, 1884, to January 20, 1885?

A. No interest here it seems. I generally aimed to have money to their credit to meet such things. The interest on this may have been an oversight.

Q. 131. Do you know what the condition of the accounts of Bain & Bro. at the Exchange National Bank was for many years prior to its failure if so, state it.

A. Well, I dont know that I can state it. I had the whole Bank to look after and looked after that along with others.

Q. 132. Did you know that on the day the Bank paid that draft of Bain & Bro. your firm was indebted to the Bank as follows: Overdraft on individual ledger, $53,310.70; on clearing house settlements, $63,534.49; on pro forma account, $177,793.55, besides a large amount in the receiving teller's cash?

A. I cannot say I did.

Q. 133. You say you kept the general run of the account, say about how much was your firm indebtedness daily on all these accounts for several years?

A. I tried to keep a general run, but I cannot answer this question.

Q 134. Take for instance, the books for the date November 24, 1884, and the statement examined by Mr. R. T. K. Bain, in his answer to question 493 of his deposition, and say what was due by Bain & Bro. on clearing house settlements of that date?

A. $400,088.01.

Q. 135. This was evidenced at the bank how, by what paper?

A. Now I can't say. I don't recollect.

Q. 135½. Have you any knowledge of a similar transaction in guano occurring January 18, 1881, the purchase of a cargo by the James Bain for $50,511.70; if so, was the draft of Alexander Brown & Sons therefor on Bain & Bro. paid by the Exchange National Bank by a credit of that amount on Alexander Brown & Sons' current account at the bank, the draft thereafter carried in the receiving teller's cash till March 18, 1881, and then taken up by a fresh discount for Bain & Bro.?

A. I recollect of such a cargo of guano but none of the particulars.

Q. 136. Will you please verify the facts above inquired of as to the two

cargoes of guano, by careful examination of the books of the Exchange National Bank, with the aid of Mr. Bulkley, the expert, and make report thereof to the Master before you finally leave the witness stand?

A. I don't care to go into the examination. I will admit your statement as the fact if you desire it, just as you say. I haven't had anything to do with the books for over a year, and am too broken down to do it.

Q. 137. Do you need any evidence to convince you of those facts in regard to the purchase and payment of those two cargoes of guano?

A. I do not desire any.

Q. 138. Who composed the firm of Whitehead & Bain?

A. I don't know that there was any special firm about it. John B. Whitehead and myself were Whitehead and Bain.

Q 139. Is the indebtedness of Whitehead & Bain truly stated in the plaintiff's bill and amended bill?

A. I believe this is correct.

Q 140. Do you know what Whitehead & Bain purchased with the proceeds of the note mentioned in paragraph 4 of the plaintiff's bill for $11,500, July 15th, 1885?

A. I think we purchased some stock of the Exchange Bank.

Q. 141. How much and in what year?

A. I don't know wh t year. I think we purchased 100 shares. I am not positive.

Q 142. Was not this note for $11,500 the renewal of two certain notes consolidated into this one, which the bank commenced to carry December 30th, 1875, and February 9th, 1876, respectively, the proceeds of which were given for the purchase of seventy-five shares of Exchange National Bank stock from M. Parks and fifteen shares of same stock from William Nichols and Lowell Savings Bank?

A. Well, it is probable.

Q. 143. Have you any reason to doubt it was?

A. Well, I will say it is so then, if you prefer.

Q. 144. Is not this stock a part of that mentioned in your answer as owned by you on page 7 of your answer to plaintiff's amended bill?

A. Yes.

Q. 145. Can you mention any other investments made by you, either jointly or on your own account, with the funds obtained from the Exchange National Bank?

A. Well, Mr. Whitehead and I had numbers of stocks and perhaps some bonds. He had them all in his possession.

Q. 146. Can you mention anything besides stocks and bonds?

A. We had interests in some mining property.

Q. 147. Specify that property and your interest in it, and when and how it was purchased.

A. We had an interest in what was called the "Laura Dunmore" and the "Boomerang." I don't recollect exactly, but I think Mr. Whitehead and myself owned one-third of the Laura Dunmore and I think one-fourth of the Boomerang. I am not certain of either.

Q. 148. Look at the paper styled "an amended and supplemental inventory" filed by the Trustees, under the deed of April 6th, 1885, and say whether you refer to the mining property mentioned therein?

A. Yes, this must be it, sir.

(This answer was made after the witness examined the paper marked "Amended and Supplemental Inventory, filed November 11th, 1885.")

Q. 149. Now say when and with what funds you paid for this property, what it cost and how it was paid for?

A. I don't recollect what it cost. We paid for it by check on the Exchange Bank, I think.

Q. 150. Did Whitehead & Bain have funds to their credit to meet that check, at the Exchange National Bank on their account then?

A. No.

Q. 151. Please examine the check now shown you dated August 29th, 1884, for $49,000 and say whether this is the check you refer to in your answer to question 149 as having been drawn to pay for that mining property.

A. That is the check and my interest cost $16,333.33.

Q. 152. Please examine another check now handed you and in whose handwriting the same is drawn, dated August 4th, 1884, by Whitehead & Bain on the Exchange National Bank, for $10,000, and for what purpose were those funds used?

A. This was drawn for the Laura Dunmore and my interest in that was $5000.

Q. 153. Now examine another check dated the 13th August, 1884, for $300 and say what were the funds received for that check used for?

A. I don't know that I can tell. It may be for work done on the Laura Dunmore. I am not certain about it.

Q. 154. Say in whose handwriting these checks are drawn and to what are they all payable?

A. The two larger ones are in my handwriting, the smaller one in the hand of Mr. Whitehead payable to draft of W. H. Echols, Jr.

Q. 155. Now say what stocks and bonds mentioned in the inventory of Bain & Bro.'s estate were purchased with the funds received from the Exchange National Bank by Bain & Bro. Take the inventory and specify them. (Here witness examines the inventory.)

A. I don't know anything of any of it. There is ten shares of the stock of the College for Young Ladies, that was mine, but you can't say that was purchased by money of the Exchange Bank, and I owned the Chesapeake and Idaho stock, and some of the Norfolk and Ouray Mining Company's stock.

Q. 156. Then say with what funds you purchased the shares of Norfolk and Ouray Mining Company's stock and the shares of the Chesapeake and Idaho stock?

A. I can't say.

Q. 157. What have you said about them in your answer?

A. The Answer here says "part of it" and that is all I can say, I am willing to stand by the answer.

Q. 158. Then you say now that a part of the sum of $36,860.09 for which you are now indebted to the Exchange National Bank was used by you for the purchase of 450 shares of Norfolk and Ouray Company's mining stock, and part for 625 shares of the Chesapeake and Idaho Mining

Company's stock. Are these shares of stock embraced in the inventory of the trustees, page 83 thereof?

A. Yes.

Q. 159. At what price did you buy Norfolk and Ouray Mining stock?

A. $25 I think.

Q. 160. And what what was the price of Chesapeake and Idaho stock?

A. $21.50 per share.

Q. 161. What was the par value of these two stocks?

A. I think the Idaho was $50, and the Ouray was $100.

Q. 162. Did you know how much real estate your firm owned at its failure? If so, state the amount.

A. No.

Q. 163. Have you had anything to do with making up the inventory filed by the trustees?

A. No.

Q. 164. Where were you from the 2nd day of April, 1885, to the 6th day of April, inclusive?

A. At home.

Q. 165. Were you up and able to attend to business during that time?

A. I was in bed.

Q. 166. What was your condition?

A. Prostration.

Q. 167. How long did it continue?

A. I don't know that I have ever gotten over it.

Q. 168. Were you at your brother R. T. K. Bain's house near Portsmouth during the time of the preparation of your deed of assignment?

A. No sir.

Q. 169. Who was counsel for your firm during that time?

A. Walke & Old I think.

Q. 170. Were you consulted about the purchase by Bain & Bro, of any property between the 2nd and 6th of April, 1885?

A. No sir. I did'nt know they purchased any.

Q. 171. Were you consulted as to the sale of any property to the Richmond Cedar Work about that time?

A. No.

Q. 172. Were you consulted about the preparation of the deeds drawn and executed at R. T. K. Bain's house, between the 2nd and 6th of April, 1885, if any such were drawn?

A. No.

Q. 173. Then who managed the transfer of your property to the trusteees?

A. Mr. Robert Bain.

Q. 174. When did you first see the deed of Bain & Bro. to the trustees or know of the scheme of distribution provided therein?

A. The day I executed it. I don't recollect the date.

Q. 175. At what hour of that day did you execute it?

A. I don't remember.

Q. 176. Is your memory of that transaction clear or cloudy?

A. My memory is very defective anyhow.

Q. 177. Were you then laboring under great physical and mental prostration?

A. Yes and ever since.

Q. 178. Were you in fit condition that day to attend to important business?

A. I attended to that.

Q. 179. Did counsel for the Exchange National Bank wait on you and urge you to secure your firm and individual debts to the bank? If so, say what occured at that time at your house between you and said counsel.

(Counsel for trustees here objects to the above questions as irrevelant and incompetent.)

A. Mr. Thom was to see me and I can't remember exactly what occurred but I do recall of asking him to give me advice as to the right in a comprehensive sense. My impression is his answer was "I could but would not take the responsibility." I think he desired that I should not sign the deed.

Q. 180. When you first saw the deed of Bain & Bro. of April 6th, 1885, had it been signed by R. T. K. Bain and wife?

A. Yes.

Q. 181. Did you differ with him then as to the preferences then provided by said deed? If so, what change did you make?

A. I had my individual indebtedness secured.

Examination adjourned to Saturday, March 20th, 1886, 10 A. M.

CHAS. T. BARRY,
Special Master.

SATURDAY, March 20th, 1886—11 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; Richard Walke, counsel for trustees; H. D. Bulkley, expert accountant, and George M. Bain, witness.

Q. 182. What was the extent of the indebtedness of Wallace & Son to Bain & Bro. on the 2d of April, 1885?

A. I don't know.

Q. 183. Were you aware of the dealings between Wallace & Son and Bain & Bro. for many years prior to your failure?

A. I knew they had been doing business with them from the time Bain & Bro. commenced.

Q. 184. Did you keep posted as to the financial condition of Wallace & Son?

A. I knew that they had valuable property, were doing a lumber business, and I supposed they were good for what they entered into obligation for; further than that I didn't know.

Q. 185. What was the extent of their obligations, and what, in your judgment, was the value of their assets on the 2d day of April, 1885?

A. The only extent of their obligations that I knew of was their notes, which I thought was all, but I supposed their assets were largely above their obligations.

Q. 186. To what notes of Wallace & Son do you refer in that answer, and had you any information as to the amount they owed your firm?

A. Such as were in the Exchange Bank; I had no further information than that.

Q. 187. Is it true that on the 2d day of April, 1885, Wallace & Son then owed Bain & Bro. considerably over $300,000, and did you know that fact?

A. If they have stated it I take it as a fact; I did't know it of my own knowledge.

Q. 188. But have you stated it in your answer to the bill, and is it true?

A. I accepted this as a fact when I stated it; I had no access to the books, nor did I examine them.

Q. 189. Then if you did not know the amount of Wallace & Son's indebtedness, how did you arrive at a good idea of their solvency?

A. I arrived at it from what I thought I knew.

Q. 190. Are the notes of Wallace & Son, which are now held by the plaintiff among those bills receivable which you say in answer to question 68, "I considered good by themselves by the makers and endorsers?"

A. Yes.

Q. 191. Name some others of the bills receivable rediscounted and habitually carried for Bain & Bro. at the bank, the makers of which you considered good by themselves; take this list (which is a statement of notes held by the Exchange National Bank on April 2d, 1885, endorsed by Bain & Bro..) and say which of them you considered good by themselves, which doubtful and which worthless?

(The Master here files the list marked "List of notes endorsed by Bain & Bro.)

A. I considered them all good, as I stated.

Q. 192. What did you know about W. C. Dutton & Co., whose notes for $32,479.11 are shown in that list?

A. Well, I can't say positively what Mr. Dutton had; I knew he carried on a large oyster business, and understood he planted oysters very extensively; I also understood he owned some real estate; I understood it was required that he should plant an immense quantity of oysters to carry on his business, and there was the outlay.

Q. 193. Did you know he owned real estate; if so, where and what amount?

A. I didn't know. I was under the impression he did, and I got the impression from some inquiries.

Q. 194. What did you know about the Greenville Land and Lumber Company's solvency?

A. Only that I understood that they owned valuable land and lumber and had facilities for manufacturing and getting lumber to market.

Q. 195. How much did you know the Greenville Land and Lumber Company owed Bain & Bro. when the bank discounted these notes?

A. Nothing apart from the notes.

Q. 196. Then how did you know they were solvent?

A. I believed it.

Q. 197. Do the names of the makers in the list of notes just shown you appear to have had their paper constantly carried at the bank for Bain & Bro. during some years prior to the failure?

A. Some of them.

Q. 198. Say whether or not a large majority of these names do so appear.

A. Yes.

Q. 199. Examine the shares of Seaboard Cotton Compress Company's stock owned by Bain & Bro. at any time prior to your failure, the certificates of which are here presented to you, numbered as follows: No. 40 for 125 shares. No. 48 for 1,100 shares, No. 54 for 245 shares, and say when the said shares were respectively issued by Bain & Bro.

A. No. 40 is dated 7th November, 1882; No. 48 is dated 7th October, 1884, and No, 54 is dated 8th October, 1884.

Q. 200. When did Bain & Bro. become stockholders of that company?

A. I reckon in 1881 or 1882, I don't know which.

Q. 201. Now examine one of the bonds of the Meherrin Valley Railroad Company, being one of the lot of $200,000 worth of said bonds now held by the plaintiff, and say when were those bonds issued and when did the whole lot come to your hands as cashier?

(The said bond is here handed the witness and is identified by him.)

A. I did not know this railroad was built until it was finished. I then learned that it was to be bonded and that there was a prospect that they would be put upon the market in New York. From that moment I claimed and was promised the control of these bonds, and so considered that I held them. The date of issue is 1st day of July, 1884.

Q. 202. Where did the whole lot of $200,000 of the bonds come from and how did you get actual, manual possession of them?

A. They came from Bain & Bro. They were delivered to me I expect by Mr. Robert Bain; I don't remember but am pretty certain though, when executed I think.

Q. 203. What do you mean by executed in that answer?

A. Signed by the officers and trustees.

Q. 204. Were they signed by the trustees after July 1st, 1884, if so, how long after?

A. I don't recollect.

Q. 205. How long before your failure were they brought to the bank?

A. I don't recollect. I had them there some time, as soon as they were executed but I don't recollect the time.

Q. 206. You did not have them prior to July 1st, 1884, did you?

A. I told you in a former answer that I claimed and was promised the control of these bonds from the moment I heard the road was to be bonded.

Q. 207. What did Bain & Bro. give for them?

A. I don't know, but I understood they built the road.

Q. 208. Explain what you understood Bain & Bro. did towards building the Meherrin Valley Railroad.

A. I understood they furnished the money.

Q. 209. What was your interest in the firm of Bain & Bro?

A. One fourth.

Q. 210. From what source did Bain & Bro. receive the money to build the Meherrin Valley Railroad, and how much did it cost your firm?

A. From the firm's current business, I suppose; I don't know what it cost.

Q. 212. When your firm's current business needed money where did you usually obtain it, and on what obligation?

A. From the Exchange Bank on the bills receivable and on their own notes.

Q. 213. Is it probable that the monies thus raised from the Exchange National Bank went to build the Meherrin Valley Railroad?

A. Some of it I don't know that you could identify it.

Q. 214. Is it probable that the monies thus obtained from the Exchange National Bank went to aid the business of Wallace & Son.?

A. Some of it.

Q. 215. And also to aid the Greenville Land and Lumber Company?

A. Possibly so.

Q. 216. And also to purchase your interest in the Seaboard Cotton Compress Company?

A. I am not clear about that: I will say yes.

Q. 217. Are you not clear about the stock purchased from C. W. Grandy with money obtained from the Exchange National Bank?

A. Yes; but I am not clear about the other.

Q. 218. And also to purchase Southern Telegraph Company bonds?

A. I think the Southern Telegraph bonds came from the sales of lumber by the Greenville Land and Lumber Company. I am not certain, but I think they came that way, and perhaps from building part of the line by Mr. Dill.

Q. 219. Do you know of any other purchases of property by Bain & Bro., or either individual member of the firm, with the funds thus obtained from the bank?

A. No.

Q. 220. Who were W. H. Echols, Sr., and W. H. Echols, Jr.?

A. They were father and son, and reside in Huntsville, Alabama.

Q. 221. Through whom did you buy your interest in the "Laura Dunmore" and "Boomerang" mines?

A. Wm H. Echols, Jr.

Q. 222. Who bought jointly with you the interest in the "Boomerang" mine?

A. Mr. Whitehead and W. H. Echols, Sr.

Q. 223. How did W. H. Echols, Sr., pay his part of the $49,000 draft for that mine?

A. He remitted the amount to Mr. Whitehead and myself.

Q. 224. Is there a suit about your interest in the "Boomerang" mine by W. H Peters, receiver, against George M. Bain, Jr., now pending in Colorado in the Circuit Court of the United States; if so, have you filed your answer therein, claiming that the said property is conveyed to your trustees under your deed of assignment?

A. There is such a suit pending; I have filed my answer therein—filed something—yes, an answer, that the deed of assignment conveyed everything wherever found.

Q. 225. Have you any idea what was the total amount of Bain & Bro.'s debt to the Exchange National Bank on the 2d of April, 1885?

A. I think the amount is stated in the bill of the receiver.

Q. 226. Did you know at the time of your failure what was the total indebtedness of Bain & Bro.?

A. No.

Q. 227. Do you know now?

A. No; I do not.

Q. 228. Is there anything material to this examination or of benefit or advantage to either party to this suit now pending in this Court which you desire to state or of which you have any knowledge?

A. No.

Counsel for trustees not desiring to cross-examine the witness, the examination of said witness is here closed, and further this deponent saith not.

GEO. M. BAIN, JR.

Subscribed and sworn to before me this 20th day March, 1886.

CHAS. T. BARRY,
Special Master.

The witness now, having fully testified in obedience to a summons in behalf of the plaintiff, desires here to protest that no fact or information as to his dealings with the Exchange National Bank of Norfolk, obtained by this examination, shall be used either directly or indirectly against him or others in the criminal proceedings now depending in this Court against him and others, the said examination having been directed to matters almost wholly irrelevant to the issues before the Master, and in large part personally conducted by one H. D. Bulkley, whose name is endorsed upon the indictments in said criminal proceedings as a witness for the United States, and who is now in the employ of the plaintiff as an expert accountant.

And further this deponent saith not.

GEO. M. BAIN, JR.

Filed March 20, 1886, with deposition of Geo. M. Bain, Jr.

CHAS. T. BARRY,
Special Master.

NOTE BY COUNSEL FOR PLAINTIFF—In reply to the protest above filed

by George M. Bain, Jr., the plaintiff here repeats what he has said in reply to that filed by R. T. K. Bain; except this, that counsel for the trustees, who are also counsel of record for Bain & Bro. in this cause, moved the Special Master to exclude H. D. Bulkley, the expert, from the room during the examination of George M. Bain, Jr., which motion the Master denied and refused.

The said H. D. Bulkley did not in any wise personally conduct said examination, but did aid the Master and counsel on both sides in the inspection of the books as provided by the order of November 11th, 1885.

[Signed] T. S. GARNETT,
Counsel for Plaintiff.

And now, at the hour of 2 P. M., personally appeared W. G. MAUPIN, a witness called by the plaintiff's counsel, who, being first duly sworn, deposed and testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. W. G. Maupin, Jr.; aged 38 years; residence, Portsmouth, Va.; occupation, teller of the Merchants' and Farmers' Bank of Portsmouth, Va.

Q. 2. What was your occupation on the 2d of April, 1885, and for how long were you so occupied prior to that date?

A. I suppose I was teller for Bain & Bro.; I stood at the counter all the time; I couldn't say how long; I went there as a boy and runner; I think I went there as a boy in 1867 or 1868.

Q. 3. Describe what were your duties for several years prior to the failure of Bain & Bro.?

A. I waited on the public; teller, I suppose. I had no duty assigned me.

Q. 4. Did you keep and make any entries in any of the books of Bain & Bro.; if so, point out the books so kept by you?

A. Well, I kept the cash ticklers from about 1875 (not exclusively); the books marked respectively X X and X X 1 (not exclusively); one of these books was called in our office the "red ink cash book," and is now marked X X 1, the other book, marked X X, was called the "money cash."

Q. 5. Explain what connection book marked X X, or "money cash," had with book marked X X 1, or "red ink cash book?"

A. I don't know, sir; I can't explain it.

Q. 6. What entries in one designate daily cash balance on hand for commencement of business; illustrate, say for April 1st, 1885?

A. April 1st, 1885, cash items on hand was $597,333.76; that is what cash I ought to have had on hand then; this was cash items and paper that cash had gone for.

Q. 7. Now look on Tickler "L" page 126 and say what composed the cash balance $555,273.58 on hand at the close of business of April 1st, 1885, give the items and where did you get them from.

A. I can't answer that, sir.

Q. 8. Was there any book within your knowledge kept by Bain & Bro. to show the exact items composing the daily cash balance, if so, what was it?

A. These books show it.

Q. 9 Name some item for instance entering into that daily cash balance which you can point out by these books, either money, property or cash that had gone out.

A. I can't point out these items. There was too many of them. Some of those papers have been accumulating for some time. I couldn't tell what they are. Some have been there as long as I have. Captain Thomas A. Bain used to overhaul them to straighten them out. I came in right behind him when he got sick and died and we were pressed for help. I used to do the mechanical part of it and when the papers got so big I used to tie them up in a bundle and take the total and go along.

Q. 10. How large was the bundle?

A. We had pigeon holes about four, five or six inches deep. When they got so near full as to cause trouble, I used to take them out and tie them up in bundles.

Q. 11. About how many pigeon holes full of those things accumulated, and formed part of your cash balance on April 1st, 1885?

A. I couldn't tell. There are a good many in the safe. I don't know how much they would make.

Q. 12. Where are these papers now.

A. Turned over to the trustees.

Q. 13. Do you know whether they are still in the safe or not? Have they been removed therefrom? If so, by whom?

A. The safe was rented out and all those things were carried back in the vault.

Q. 14. Are they in the vault now?

A. I guess they are, sir.

Q. 15. Can you and will you point them out, so they may be produced before the Special Master if required?

A. I don't know that I can; some of them I haven't seen for years.

Q. 16. Will you point out those of late date, or such as you can?

A. Yes, sir; if I can I will.

(NOTE—The Master is here requested to ask the trustees to allow the expert accountant to examine these papers.)

Q. 17. Did you know how the account of Bain & Bro. with the Exchange National Bank was kept on the books of Bain & Bro.?

A. Nothing more than what was on the check book.

Q. 18. Did you keep that check book?

A. No, sir, I did not; I made entries on it sometimes.

Q. 19. Look at the stub of Bain & Bro.'s check book marked No. 15, at the stub dated March 18th, 1885, which shows the stub of check No. 13,844 and for the sum of $46,781.81, and say in whose handwriting the stub entry is made, and all you know about said check?

A. It looks like Mr. Robert Bain's handwriting; that is all I know about it; I don't know anything about it.

Q. 20. Did that check enter into your daily cash balance at that time; show this by the cash book and your balance book?

A. It seems to be credited on tickler "L;" I don't know anything about the transaction or what it was for; it was a debit and credit and didn't affect my balance any.

Q. 21. Where is bills payable account on Bain & Bro.'s books?

A. I don't know, sir; I never kept any such account.

Q. 22. Who did?

A. Nobody that I know of, sir.

Q. 23. Was any record kept of Bain & Bro.'s notes when discounted at the Exchange National Bank; if so, where is it?

A. I can't say, sir.

Q. 24. Was there any partition or division by wood or iron railing separating the banking business and books from any other books kept by the firm; if so, describe it, and who attended to the latter?

A. There was a railing there; it didn't separate the books; they were first one side and then the other; there was a passage way between; the business, I understand, was all the same; Mr. Atkinson's desk was put back there for convenience to keep people from the counter when they wanted to see him on other than strictly banking business; after we locked the doors at 4 o'clock the clerks could work where they pleased; if it was more comfortable on the other side they would go there.

Q. 25. Did the entries and business attended to by Mr. Atkinson enter into your work or on your books?

A. So far as his depositing he would make deposits the same as any other man; I understood it was all the same business.

Q. 26. How were Mr. Atkinson's disbursements made?

A. He would draw a check and the money would be paid on it; a check or warrant; he would sign it and stamp it "Charge wharf," and get the money that way.

Examination adjourned to Monday, March 22d, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

MONDAY, March 22d, 1886—10 A. M.

Examination continued.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; Richard Walke, counsel for trustees; H. D. Bulkley, expert accountant; W. G. Maupin, Jr., witness.

Q. 27. Explain what that wharf account represents on Bain & Bro.'s books.

A. The business that Mr. Atkinson kept on his books, just like any other account, individual deposits.

Q. 28. Then look at that wharf account on Ledger "H" "1" page 484, and say whether the debit balance there shown of $148,030.68 in an overdraft on that account.

A. That is the way it shows, sir.

Q. 29. What property is represented in part, or as a whole, by the outlays on that account?

A. I can't say, sir. I reckon the wharf books will show.

Q. 30. Do you mean these six wharf day books?

A. I can't say which books they are, sir. Mr. Atkinson kept those books. I had just as much as I could attend to waiting on the counter.

Q. 31. Examine Red Ink cash, marked Exhibit XX 1, and say what the full meaning is of the abbreviations "Sev" and "M" in that account.

A. "Sev" means several, that is, a number of entries consolidated. If you trace back you will find them. "M" means cash items, money and papers that represent money that was paid out of the cash.

Q. 32. Now say whether these items embraced under that designation "M" were charged regularly on the books (and show where they are) to the respective accounts, to which they should belong.

A. Why, they couldn't be charged up if they were carried as money. You couldn't count them twice.

Q. 33. If the memorandum or paper so carried as a cash item should at any time have been lost, what would you have had to show for it, or to account for the deficiency?

A. Nothing, unless I could tell what it was.

Q. 34. What was the average daily amount of actual cash money you carried in the cash balance "M?"

A. Well, I should think from ten to twenty thousand dollars. I never felt satisfied when it got down below ten thousand. I would then always try to replensh, keep it up to $10,000.

Q. 35. Then the difference between $10,000 or $20,000 and the $555,273.58, the cash balance on hand as of April 1st, 1885, was made up of what?

A. Papers that cash had gone for, cash paid out, papers that represented cash.

Q. 36. And how long did you say many of these papers so carried, had been there?

A. Well, a very long time, sir. I mean these balances that were carried forward. I took the figures that were on the book. I didn't look to see they were in there.

Q. 37. How long?

A. Some of them I think has been carried pretty near as long as I have been there. I don't know, though.

Q. 38. Who had general management of affairs at the banking house of Bain & Bro.?

A. Well, when I first went there, there were four of them. I recognized them all as in charge.

Q. 39. I mean after 1870.

A. The other three after Thomas A. Bain died, then Robert and Jim Bain had charge.

Q. 40. Who seemed to control the affairs of the banking house chiefly when Robert and James had charge?

A. Well, some part of the business was controlled by one and some by the other. If a person wanted a discount he generally went to Mr. Robert Bain.

Q. 41. Who managed the outside business chiefly, such as merchandising, guano, brick-making, lime, shells, farming, &c.

A. Captain Thomas A. Bain was the pioneer farmer. He used to look after the property and brick kilns during his life; after his death, I think Mr. Robert Bain attended to them—he and his subordinates.

Q. 42. You say in answer to question 24 of your deposition, as follows: "The business, I understand, was all the same." Do you mean you understand this since the failure, or did you know it before?

A. I always understood the business was Bain & Bro. The money was Bain & Bro., and the profits were Bain & Bro.

Q. 43. Was any division of profits made between the members of the

firm; do the books show it; if not, how do you know who took the profits?

A. I don't know.

Q. 44. Do you know of any enterprises undertaken within recent years by Bain & Bro., either of manufacturing, railroad building, or lumber getting; if so, state particularly what some of such enterprises were?

A. I don't know anything about that part of the business. My business was principally waiting on the counter.

Q. 45. Did you wait on M. T. Dill, president of the Greenville Land and Lumber Company, and did you know that Bain & Bro. were dealing largely with that company?

A. I waited on him as I would any other customer, I knew the Greenville Land and Lumber Company were doing business with Bain & Bro., but I didn't know what interest the Bains had with it outside of the business account on the ledger.

Q. 46. Where were you from the 2d to the 6th of April, 1885, inclusive?

A. At home, principally, 608 Court street, Portsmouth, Va.

Q. 47. What was the condition of the public mind, if you know it, in Portsmouth, during that time?

A. I couldn't say; I was unwell and lying down most of the time; a great many asked me questions, asked me how the matter stood; I answered that I knew nothing about it; I couldn't give them any statement; I didn't talk with a great many people; there were crowds on the streets; I was in the same boat that they were; mine was there, what I had.

Q. 48. Were the people agitated or excited by the recent bank failures?

A. I saw no violence; they were anxious to know something about it; I didn't talk with a great many.

Q. 49. Look at Ledger "H 1," page 434, and say how that last item on the debit side of wharf account got there, from what book was it posted, and when was the entry made?

A. It seems to have been taken from "certificate account," on the same series of ledgers, (Ledger "H 2," page 90,) credited to "certificates" and charged to wharf account, which is a debit and credit account, without altering the balance, without affecting the result. I suppose the entry was made after the trustees took charge; I can't say when, as it was not made by me.

Q. 50. That entry is "C. of D., $7,434.58;" say what that entry originally was and when did it come on the books; explain it?

A. I can't say any more that the books say.

Q. 51. On whose acconnt does it first appear as debit; give the name and date, book and page?

A. George M. Bain, Jr., executor; it occurred by sundry checks being charged to that account; it first appears on individual Ledger C, page 65; the total appears first December 2d, 1872, according to the book.

Q. 52. How was that account closed?

A. It seems to have been closed by crediting it with the amount and charging certificate account on the same ledgers.

Q. 53. Now, when was certificate account debited with that $7,434.58, and how did the same debit get on wharf account and at what date?

A. The book shows December 23, 1872, Ledger C, page 156, it was charged to certificate account and credited to Bain, executor, and remained there in certificates to 1885, and then credited to certificates and charged to wharf account on April 1st, 1885.

Q. 54. Now, when was that certificate account on page 90 of Ledger "H 2" made up and entered; by whom and by whose direction?

A. I can't say.

Q. 55. Point out any entries therein made by you after the trustees took charge?

A. I made an open account of C. R. Pope's certificate account, carried it to page 379, so that I could consolidate it so that the trustees could give one certificate for the whole amount.

Q. 56. Did the trustees open a new set of books?

A. Yes, sir.

Q. 57. Did you assist them in making up this inventory and filed June 16th, 1885?

A. I don't remember now, sir; I attended to the writing up of the pass books more particularly.

Q. 58. What is the total amount due by Bain & Bro. to their depositors?

A. I assisted in that department; about $889,000.

Q. 59. Is the amount of overdrafts stated in the inventory at page 85, to wit, $111,131.93, true and correct; if not, show what it ought to be?

A. I don't know.

Q. 60. Look at list of overdrafts filed with the trustees' inventory and say what amount should be added thereto to approximate correctness, after looking at the other books now before you?

A. I don't know what it ought to be.

Q. 61. Is that list of overdrafts in your own handwriting?

A. Yes, sir.

Q. 62. Say why you omitted to enter the amount of Wallace & Son's overdraft in that list?

A. I can't say; I don't remember now.

Q. 63. Look on Wallace & Son's account and say what was the overdraft shown thereby—Ledger H 2, page 444.

A. It appears to be $99,495.58.

Q. 64. Is that amount omitted from the inventory filed by the trustees?

A. Their name is written on the list; the amount left blank, I suppose, for instructions; I can't recall why now.

Cross-examined by Richard Walke, of counsel for trustees:

X-Q. 1. You have stated that the amount of Bain & Bro.'s indebtedness to their depositors is about $889,000; did that include the deposit of the Richmond Cedar Works?

A. No, sir.

X-Q. 2. Please state how high the deposit account of Bain & Bro. would sometimes run in the years preceding their failure?

A. Deposit account run over $1,000,000 (a million dollars), over that sometimes.

X-Q. 3 What seasons of the year would it be highest and why?

A. About July, August and September it would run the highest, after the farmers get their money in, then it would begin to accumulate.

X-Q. 4 How would it be in April; was that a time when the deposit account would be high or low?

A. March and April would be the lowest months we would have. I reckon it would run lower then than any other months in the year.

X-Q. 5. If you can do so, recall about how high the deposit account would run at times?

A. I have known it to go up over $1,100,000, possibly $1,200,000.

X-Q. 6. Please state how the deposit account of Bain & Bro.'s banking house compared with that of any other bank in the city of Portsmouth or Norfolk, leaving out the Exchange National Bank?

A. I have no way of telling except from the statements I saw in July, 1884. Then it looked as though Bain & Bro. were doing twice as much business as the Bank of Portsmouth, and the individual deposits were almost as much as any two banks in Norfolk, judging from their published statements, as that was flush times with money. It began to accumulate then.

X-Q. 7. And did Bain & Bro.'s depositors continue to deposit with them up to the time of their failure?

A. Yes, sir.

X-Q. 8. Were any deposits brought there on the morning of their failure?

A. Yes, sir; and returned by the trustees after they took charge.

Re-direct:

Q. 65 Did any of Bain & Bro.'s depositors except those you have just mentioned have their deposits paid to them after the failure?

A. No, sir.

Q. 66. Then why is not the deposits of the Richmond Cedar Works included in the amount you say is due the depositors?

A. I can't say. I don't know anything about that transaction. I was speaking about money I took.

Q. 67. Was not their deposit paid to the Richmond Cedar Works after the failure of Bain & Bro.?

A. As I have said before I don't know anything about that transaction.

Q. 68. Did any check on Bain & Bro., drawn by the Richmond Cedar Works, dated April 3d, 1885, come to your knowledge after the failure: were you not at the banking house between the 2d and 6th of April, 1885?

A. I never made any transaction for Bain & Bro. after I shut that safe up until the trustees took charge, on the 6th of April, I think it was: Mr. Old took charge of the office—Messrs. Old, Griffin and Jenkins, altogether. I gave them everything I had, just as I closed work on the 2d of April, 1885.

Q. 69. Are you sure that the check now shown you dated April 3d, 1885, for $31,885.70, was not turned over by you on the 6th of April, 1885, to the trustees?

A. I think that check was handed me by Mr. Old that morning that he came down there, and told me it was for Wallace's credit. That is as well as my memory serves me.

Q. 70. Then, if the said check was so credited. by whose direction was it so done?

A. I made a deposit ticket, like I always do, and pinned to it, put it in my tin box, because anything that happened that day I haven't put on these books yet. I was waiting for instructions as well as I remember, Mr. Old said the check was for Wallace's credit.

Q. 71. Did Mr. Old employ you that day to clerk for the trustees?

A. I really can't say whether it was that day or not.

Q. 72. Name the lowest figure at which the deposit account of Bain & Bro. would run at times.

A. Since 1881, 1882 I don't think it has been any lower than it was April 1st, 1885. That was the year the truck farmers made that good year. And further this deponent saith not.

WM. G. MAUPIN, Jr.

Subscribed and sworn to before me this 22nd day of March, 1886.

CHAS. T. BARRY,
Special Master

Mr. George R. Atkinson, Jr. being first duly sworn deposed and testified as follows, to wit:

Q. 1. What is your name, age, residence and occupation?

A. My name is Geo R. Atkinson, Jr., aged 37 years, residence Portsmouth, Va., and by occupation insurance agent.

Q. 2. Are you a practical bookkeeper and accountant, and are you also engaged as such at any bank now?

A. I know some little about bookkeping and am employed at the Marine Bank of Norfolk as clerk.

Q. 3. How long were you employed by Bain & Bro.?

A. About six years.

Q. 4. What were your special duties, and point out the books you kept for them?

A. I was bookkeeper. I kept the wharf books carried on the insurance business for them, and did anything else I was told to do.

Q. 5 Explain what items of property entered into the wharf property.

A. Brick, lime, sand, farms, manure, guano, rents. That is about all I can think of. Some real estate, individual accounts of the members of the firm, I think too.

Q. 6. Who attended chiefly to these several kinds of business and from whom did you get the data for these accounts?

A. R. T. K. Bain attended to them chiefly. I had authority to sell merchandise of any kind.

Q. 7. Was this business separate from the banking business? Explain the connection if any.

A. It was all a partnership concern the same parties owned that that owned the bank.

Q. 8. Did you keep separate cash books and ledgers from those of the bank business?

A. I did.

Q. Were all the disbursements for these several accounts duly charged to them at the time they were made, or, were they carried frequently and for long periods of time, as cash items or tickets?

A Sometimes they were charged at the time and sometimes carried as cash items.

Q. 10 Refer to the account of Geo. M. Bain, Jr. executor and show what was done with his debit balance of $7,434.58 of December 2nd, 1872. Ledger C. p. 65.

A It shows it went to certificates on page 156 Ledger C, from there it went to certificate on Ledger H. 2, p. 90 and from there it went to debit of wharf account p. 434 of Ledger H. 1.

Q. 11. Who made that last entry on page 434 Ledger H. 1 and when was it made and by whose orders, and why?

A. I made it I don't remember whether it was made the day it indicates or whether it was made afterwards. I suppose by order of the trustees if it was done after April 2nd, 1885, if prior, it was ordered by Mr. Bain. I don't know why.

Q. 12. Refresh your memory if possible by any entries made by you on that page 434, and say whether you can remember that the last debit entry was made after April 1st, 1885, to wit $7,434.58.

A. It is possible that entry was made after April 1st, 1885, as I see a credit of certificate No. 2028 $174.13 and one No. 2166 for $515.42, I think they were done after April 1st, 1885. It is possible that the one of George M. Bain, Jr. as executor was done after, as I was instructed by the trustees to take what certificates out of the certificate account that didn't belong to the depositors.

Q. 13. Do the books indicate that any certificate of deposit for that amount was ever issued? If so, when?

A. None to my knowledge.

Q. 14. If one was issued where would it properly appear?

A. At that time I think it would appear on Ledger C or prior. I was not in the employ of Bain & Bro. in 1872.

Q. 15. Look on the ledger you have indicated and see if it can be found by you?

A. I don't see anything of it.

Q. 16. As a bookkeper do you say that the transfer of an overdraft of $7,434.58 from the account of George M. Bain, Jr. to the debit of certificates account, there being no corresponding credit in certificate account, is a proper entry?

A. I don't profess to be an expert and decline to answer the question. I don't see any impropriety in the transfer being made.

Q. 17. Then say whether there was any impropriety in charging wharf account with that same debit $7,434.58.

A. Q. 38, because some of the certificates appear in the wharf account.

Q. 18. How would it be if no certificate was ever issued for that amount?

A. I shouldn't think there would be any then. The individual accounts of Bains are kept on the wharf ledger.

Q. 19. Say whether after such transfer the balance as shown to credit of certificate would correctly represent the certificates outstanding.

A. I think so.

Q. 20. Which one of the Bain's accounts was this $7,434.58 charged to on the 1st April, 1885?

A. I don't recollect that it was ever charged up. I could tell by looking at the wharf books. I don't think any entry has ever been made for it since it was carried to wharf account. It is possible that the wharf cash book would show such entry if it was carried further than the wharf account.

Q. 21 Look at the inventory filed by the trustees in this cause at page 34, item mark number 7, and examine the itemized list, aggregating $89,-378.20, say in whose handwriting the said list is made out, and for what purchases are the several debtors mentioned in the said list liable to Bain & Bro.?

A. In my handwriting. It would be impossible for me to say what they are liable for. It was bricks, lime, &c., &c. For instance, John T. Griffin was for brick and guano, Pretlow & Co. for lime.

Q. 22 Look at L. D. Ames's account page 261 Ledger B, and say for what guano he is indebted to Bain & Bro. Show it by the entries made in your handwriting.

A. I should judge from what the book says it was "Mt. Edgecomb" guano. The amount $1,974.39 subject to a credit $117.87 for error in price making $1.855.52 due was for guano "Ex Mount Edgecomb" as well as I remember, and the books show.

Q. 23. Name some other sales of Mount Edgecomb" guano to persons mentioned in the list here shown you with the amounts.

A. Thomas Owens, $711.25. This embraces lime and Mount Edgecomb guano.

Q. 24. How about the guano sold to John T. Griffin, $285.89, charged March 25th, 1885.

A. It was Mount Edgecomb guano.

Q. 25. How much merchandise was on hand of Bain & Bro. on April 6th, 1885?

A. I don't remember. I don't know.

Q. 26. Were any puchases of real estate made through you for Bain & Bro.

A. I never bought any real estate for them.

Q. 27. Do you know of purchases of real estate made by Bain & Bro. the entries for which were made by you on their books, if so, specify some of them.

A. One piece known as the "Cherry property," one known as the "Mansion House," one piece bought from a man named Wilroy in Norfolk County. I don't remember all of them. The books will show though.

Q. 28. Did any of their purchases of stock and bonds enter on your books?

A. Yes, Dismal Swamp Canal Bonds, Bank of Franklin Stock, Norfolk and Ocean View stock. There may be others. I don't remember. Exhibit ?

Q. 29. How was the Dismal Swamp and Norfolk and Ocean View Stock paid for?

A. I don't know. They came to me as cash.

Q. 30. From what source or through what bank did they come?

A. I don't know. They came to me through the teller.

Q. 31. Would you then usually give the teller a memorandum check signed by you for such purchases?

A. Yes.

Q. 32. And where were those checks usually charged up. I mean on what account?

A. Wharf account.

Q. 33. Is there any way of tracing such purchases into wharf account except by your memory? Where do you show the purchases of those stocks?

A. The wharf cash book will tell.

Examination here adjourned to Tuesday, March 23d, 1886, at 10 A. M.

CHARLES T. BARRY,
Special Master.

TUESDAY, March 23d, 1886—10 A. M.

Examination resumed.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; James Alfred Jones, counsel for trustees; George R. Atkinson, Jr., witness; H. D. Bulkley, expert accountant.

Q. 34. Take the Ledgers A and B and show for instance how the purchase of the Dismal Swamp Canal Company's stock is traced into wharf account.

A. On Ledger A page 221 I find charged Dismal Swamp Canal Bonds, cash $2,100, date of December 18, 1880. It came to this Ledger from wharf cash book, carried forward to Ledger B, page 482, that says under September 1, 1884, to amount from Ledger A, page 221, $2,100. I find on the 20th December, 1880, a check for $2.100 charged to the wharf account on interest cash book Bain & Bro.'s individual ledger, not numbered, dated November 17, 1880, to October 7, 1881?

Q. 35 You say this came to you as a cash item from the teller. Do you mean Mr. W. G. Maupin, Jr.; if so, how did it come to him?

A. I didn't say it came to me as a cash item from the teller, but as far as my recollection goes it did. I suppose it came to the teller, Mr. W. G. Maupin, as cash also.

Q. 36. Don't you know whether it came to Maupin through the clearing house or not?

A. I don't remember. It was years ago. Possibly it did.

Q. 37. Do you know that such transactions as the above purchase and other purchases of merchandise or guano came to you as cash items through the Norfolk Clearing House?

A. I can't say. I don't recollect that I ever examined to see.

Q. 38. Did you make an examination a few days ago for Mr. R. T. K. Bain and find the draft for the Mount Edgecombe guano and explain to him how it came through the Exchange National Bank?

A. I found the check for him for the Mount Edgecombe guano. I did not explain how it came through the Exchange National Bank to my recollection.

Q. 39. Examine this draft for $59,725.97 and say how it came to you and when did you get it and whence?

A. It came to me on January 22, 1885; I don't remember whether it was given me by the teller or Mr. R. T. K. Bain.

Q. 40. Do you know from what bank it came to Bain & Bro.?

A. I think it came from the Exchange National Bank.

Q. 41. Through what settlement with the Exchange National Bank did it come to Bain & Bro.?

A. I don't recollect.

Q. 42. Then how would such paper as this draft usually come through the Exchange National Bank?

A. It is possible it came through clearing house entry, and possibly it came through bills payable.

Q. 43. Don't you know which one of these accounts this draft came through?

A. I can't say that I do.

Q. 44. Can you look on the books and tell?

A. If it came through the clearing house I cannot; if it came through the bills receivable or bills payable I possibly can; I don't see anything of that date to indicate it on the tickler marked L, I think.

Q. 45. In what entry on guano account is this $59,725.97 included; point it out?

A. January 22, 1885, included in an item of $63,184.29, I think.

Q. 46. The difference between that amount and the draft, $59,725.97, is $3,458 32; where did that part of the entry come from and what is it?

A. I don't remember.

Q. 47. Is there nothing on your books to show you; look and see?

A. I see no book here to indicate it.

Q. 38. What book would indicate it?

A. I think the wharf cash book will show it.

Q. 49. Look at the statement filed with question 210 of R. T. K. Bain's testimony, being the discount of $200,000 of Bain & Bro.'s notes on January 20, 1885, and see if there is anything thereon to indicate to you what that difference between the draft and the entry on guano account really is?

A. It looks as if it was the discount on the $200,000 notes, as I see an item of the same amount as the difference between the draft and that.

Q. 50. Why did you charge discount on $200,000 into the guano account?

A. I don't remember; I suppose I was obeying instructions.

Q. 51. Where is the corresponding entry for either the draft or the discount on your books?

A. I gave a check for it and it was charged up on the wharf account at the bank.

Q. 52. Was any of the cargo of "Mount Edgecomb guano" on hand April 6th, 1885?

A. Yes; I think there was.

Q. 53. Do you remember a cargo of guano brought by the "James Bain;" if so, was any of that on hand April 6th, 1885?

A. Not to my knowledge.

Q. 54. Look at your wharf day book under date of March 6th, 1885, and say whether there is any entry there which indicates that there was then on hand on March 6th, '85, some of the lot of guano per "James Bain;" if so, say what amount it was and whether any was left after that sale?

A. I find on March 6th, 1885, charged to Prospect farm 16 bags guano, J. G. Bain lot, 2,624 pounds, at $68; I don't think there was any left after that sale; I am sure there was not.

Q. 55. Was the J. G. Bain cargo paid for in the same manner as the Mt. Edgecomb cargo?

A. I don't remember how it was paid for.

Q. 56. From whom did you receive instructions such as you refer to in answer to question 50?

A. If I had instructions it was from Mr. Robert Bain.

Q. 57. Were your books kept under his control and direction?

A. I was employed by Bain & Bro.: he attended chiefly to the business; the style of keeping them needed no directions; if there was anything he wanted done he generally told me to do it; when I wanted any information I generally went to him for it.

Q. 58. Did he examine your work and give you the data for any entries or corrections therein from time to time?

A. I don't recollect of anything particular; when he wanted any information about my books he generally asked me for it.

Q. 59. When did you write up most of the accounts now shown in Ledger B, the new ledger?

A. I opened it in September, 1884; from that time to April, 1885, I wrote up most of the accounts.

Q 60. Did you continue any work on it after April 6th, 1885?

A. I posted probably the entries that had already been made prior to closing.

Q. 61. Don't you know whether you did or not, and how long you were engaged in it?

A. I think I did; can't say how long I was engaged in it; wasn't long; there wasn't much to do.

Q. 62. Look at merchandise account, page 1, Ledger B, and say how much merchandise of Bain & Bro. is shown by that account as on hand at the time of their failure?

A. It appears to show $39,516.36.

Q. 63. Where was this merchandise?

A. I don't think there was that much merchandise on hand; if the credits were stated it wouldn't show that much, I don't think.

Q. 64. Name the credits you refer to; give the dates and say why they were not extended in that account?

A. Well, on page 159, wharf day book No. 6, I see credit of sundries to merchandise, $44.25, under date November 29, 1884; November 29, 1884, same book. I see a credit of $32.70; that is not extended, and numerous others prior to that; they were not extended simply because I didn't have them to do it, and they got ahead of me and I never had time to catch up on it.

Q. 65. Was not this a careless way of keeping that account?

A. Well, I don't know that it was careless.

Q. 66. Did you ever take off a balance sheet from those books?

A. I never did.

Q. 57. Do you think a balance sheet ever was taken off?

A. No; I know there never was.

Q. 68. In the condition in which they now are could it be done with any degree of truth?

A. I think so, if all the entries had been made and properly extended I don't think as they now are it could be done so as to make them balance.

Q. 69. Did you have anything to do with keeping the accounts of Bain & Bro. with the Exchange National Bank?

A. I think I made some entries on their stub book, and I assisted Mr. Robert Bain in reconciling the account.

Q. 70. Did many others of the clerks make entries on stub books and draw checks therefrom?

A. Yes.

Q. 71. What good did the reconcilement on the stub book of Bain & Bro. do?

A. It showed the difference that existed between the accounts.

Q. 72. How often did you assist in making such reconcilements?

A. I don't remember; several times.

Q. 73. Look on stub book opposite entry made 28th May, 1884, and say if the figures there shown are what you term a reconcilement, and see if the balance shown by that reconcilement is truly carried forward on the stub book; say what the reconciling balance is, and what the stub book balance carried forward is for the next day?

A. I think it is; I don't see the balance of the reconcilement carried forward; it appears to be $190,333.02: the stub book balance is $192,518.26.

Q. 74. Now say if you can find any reconcilement account of Bain & Bro. with the Exchange National Bank from that day to this?

A. Witness here examines stub book through to the end, and answers: "I don't see any."

Q. 75. Have you testified to all the pieces of property, real or personal, that you can now recall as having been purchased by Bain & Bro. and paid for, either by checks on the Exchange National Bank or by drafts coming through the clearing house through that bank; if not, specify any others?

A. I named all the property that I can remember that was purchased

by Bain & Bro. and charged up by me; I can't remember now how they were paid for.

Q. 76. Did you assist the trustees in making up the inventory?

A. I did.

Q. 77. How long were you employed by them?

A. From April to September, 1885.

Q. 78. Take the inventory and say whether you reported to the trustees any merchandise on hand at the date of the failure, and where is it shown in the inventory?

(Witness here examines the inventory.)

A. I think I assisted in making this up; on page 45 to page 51, inclusive, merchandise on hand at Bain & Bro.'s farm near Portsmouth, entitled "an appraisement of personalty."

Q. 79. State the amount of it appraised and whether all these articles on the farm of Bain & Bro., consisting of farming implements, carts, barrels, mowing machines, mules and horses, tools, lighters, &c., enter into the merchandise account, Ledger B, page 1?

A. The amount is $16,360.80; I don't think they enter into the merchandise account, all of them.

Q. 80. Where was the merchandise then?

A. The most of it was down at the Seaboard Cotton Compress Company wharf and out to the farm together at the warehouse.

Q. 81. What merchandise was at the Seaboard Cotton Compress Company's warehouse?

A. Well, there was some guano down there; I can't remember what else was down there.

Q. 82. Did that belong on merchandise account or on guano account; were not the two accounts kept separate?

A. It belonged on the guano account; the two accounts were kept separate; some guano entered into the merchandise account.

Q. 83. Now specify particularly what merchandise you mean as turned over to the trustees?

A. The inventory before you; some of it enters into the merchandise account and some does not; I can't point out each particular item from memory, nor do I believe I could from the books without a great deal of work.

Q. 84. Do you mean to include among the merchandise on hand represented by the balance on merchandise account, page 1, Ledger B, all the other personal property on Bain & Bro.'s farms; if not, what do you mean?

A. I do not, and all the merchandise shown on this inventory as on the farm near Portsmouth is not included in the merchandise account. Some belongs to the farm and some to merchandise. I do not recollect which is which.

Q. 85. Did Wallace & Son owe Bain & Bro. a large account for guano and merchandise, if so, state the amount?

A. $11,295.07.

Q. 88. Look on their account and say what part of it is for gunano "Ex Mount Edgecomb."

A Under date of February 16, 1885, $740.79, that's all I remember. I

find that on March 4th, 1884, $1,438.69 of Mount Edgecomb guano charged to Wallace & Son.

Cross-examined by James Alfred Jones, counsel for trustees.

X. Q. 1. In answer to question 52 you say "A part of the cargo of the Mount Edgecomb guano was on hand April 6th, 1885," please say if you know how much of said guano was on hand, where it was, and what became of it.

A. My recollection is, there was somewhere in the neighborhood of 300 bags in the warehouse of the Seaboard Cotton Compress Company and claimed by that company. I don't know what became of it.

X. Q. 2. Do you know of anything belonging to Bain & Bro. that was not turned over to the trustees?

A. I do not.

X. Q. 3. In answer to question of the plaintiff No. 21, you say "It would be impossible for me to say what they are liable for," that is the several debtors mentioned in the list filed by the trustees at page 84 of their inventory. Are not the debts there listed some of them paid and others subject to offset so as to make said list a very unreliable index of the debts actually due Bain & Bro.?

A. I reckon the larger portion of them are subject to off-sets. Some of them are paid by off-sets in full. There are some names there that Bain & Bro. owe a great deal more than is charged to them on that list.

Re-direct.

Q. 87. You say you were employed from April to September, 1885, by the trustees, why did you not adjust such accounts as you have mentioned above?

A. I did adjust a great many of them as far as I could get it done.

Q. 88. Do you mean that half of the debts on this list are fully off-set by debts of Bain & Bro. due to the several parties in said list?

A. I can't say exactly half. It may be more and may be less. I mean the larger portion of them.

Q. 89. And is that the case also with any other items in that inventory?

A. Yes, I think it is.

Q. 90. Then these lists as well as the inventory itself, are a very unreliable index of the debts actually due to Bain & Bro., is that so?

A. I think so.

Q. 91. Were any of the debts in the list you have just examined, paid before the trustees took charge?

A. I don't remember any that was paid. They had this off-set in full prior to the suspension.

Re-cross:

Re-X-Q. 1. In the questions and answers regarding the cargo of Mount

Edgecombe guano, it appeared there were several debts listed as due for purchases from said cargo of guano. I noticed in that list the name of J. T. Griffin, one of the trustees, is that debt one of those covered in full by that off-set you referred to, or is it still a subsisting debt?

A. It is covered in full by off-sett. Also Thomas Owens. And further this deponent saith not.

GEO. R. ATKINSON, JR.

Subscribed and sworn to before me this 23d day of March, 1886.

CHAS. T. BARRY,
Special Master.

TUESDAY, March 24th, 1886—2.15 P. M.

Examination of Witness James G. Bain commenced.

Present—Same, except Mr. H. D. Bulkley, the expert accountant, who now retires from the examination.

Q. 1. Are you the brother of George M. Bain, Jr., and of R. T. K. Bain, and the only remaining member of said firm of Bain & Bro. to be examined?

A. I am the brother of the two gentlemen named and presume the only remaining member of the firm to be examined, having heard them say they had been examined. I was not present at their examination.

Q. 2. Have you seen or read any copy of the examination of R. T. K. Bain in this matter?

A. I have not.

Q. 3. What is your age, residence and occupation?

A. Nearly 51 years of age, 102 Washington street, Portsmouth, Va., at the present I have no occupation.

Q. 4. Are you familiar with the books of account of Bain & Bro.?

A. I am not.

Q. 5. When did you enter the firm and what amount of capital did you contribute thereto?

A. We formed the firm of Bain & Bro. in September, 1885; that is, R. T. K. Bain and myself. I forget the amount that was put to my credit, but it was always understood that of the amount that was to the credit of Mr. R. T. Bain and myself the sum of $5,000 was considered as the capital stock and that amount always reported to the internal revenue for taxation.

Q. 6. What was Bain & Bro.'s system of bookkeeping?

A. I don't know as I can answer that question intelligently, as I did not attend to the books.

Q. 7. Did you have nothing to do with the books.

A. There was a settlement book called "The little red ink cash book," which for some time I made the settlements upon that book from the data furnished by the book-keepers and clerks in the office.

Q. 8. Did you have anything to do with keeping the account on the stub books with the Exchange National Bank?

A. I may have at some time entered a deposit that had been made at the Exchange National Bank by Bain & Bro.

Q. 9. Did you attempt to keep the run of the account with the Exchange National Bank and know what the indebtedness of Bain & Bro. to the said bank usually was?

A. I did not.

Q. 10. What accounts did Bain & Bro. keep on their books showing their investments from time to time in real and personal property?

A. As before stated, I was not familiar with the books; whenever I wanted any information I asked it of the book-keeper.

Q. 11. Did you know at the time of your failure what was the condition of your firm's investments in real, personal or mixed property?

A. I did not.

Q. 12. About what amount of real estate, in your judgment, did Bain & Bro. own on the 2d of April, 1885?

A. Well, there was a large number of houses, lots and farms, but what they were worth in dollars and cents I couldn't say; couldn't tell the value.

Q. 13. Or of stocks and bonds?

A. I could not; we had Exchange National Bank stock, mining stock, Southern Telegraph Company stock; that was not in my department and didn't come under my supervision.

Q 14. You did not know, then, what investments of that character your firm was making from time to time?

A. There were some investments made that I was aware of; others I was not.

Q. 15. To whose department in your business did such purchases properly belong?

A. I presumed they belonged to the firm as a whole, but, generally speaking, some member of the firm had the management.

Q. 16. Which member?

A. As far as the banking house of Bain & Bro. was concerned, I attended to the outdoor business of the office and my brother, Mr. Robert Bain, made most of the purchases.

Q. 17. Who gave most attention to the business for the last ten years?

A. Well, sir, the business—Captain Thomas Bain, Mr. Robert Bain and myself gave the business the most attention; within the last four years, my health having failed me, I was not able to give the attention to the business that I had formerly.

Examination adjourned to Wednesday, March 24th, 1886, at 10 A. M.

CHAS. T. BARRY,
Special Master.

WEDNESDAY, March 24th, 1886—11 A. M.

Examination resumed.

Present: C. T. Barry, Special Master; T. S. Garnett, counsel for plaintiff; James Alfred Jones, for trustees; James G. Bain, witness.

Q. 18. You say in answer to question 16 that your "brother Robert Bain made most of the purchases." Did you know the extent of his investments for the firm?

A. I did not. He some times consulted me about making investments and I had full confidence in his judgment, about the amount of his investments I did not know.

Q. 19. Did you advise the advance by your firm of money to build the Meherrin Valley Railroad?

A. I did not.

Q. 20. How was it done then?

A. Not knowing, I cannot reply.

Q. 21. Were Bain & Bro. interested in the Greenville Land and Lumber Company and the Meherrin Valley Railroad, as parts of one enterprise?

A. That is a difficult question for me to answer from the fact that the only knowledge I had of the Greenville Land and Lumber Company was they had an account with Bain & Bro., and as to the Meherrin Valley railroad I know nothing.

Q. 22. Do you know how your firm got the Meherrin Valley Railroad Bonds?

A. I do not, unless they were as a collateral without my knowledge.

Q. 23, Nor how they got the Southern Telegraph Bonds.

A. I think they came as collateral in some form. I didn't attend to that branch of the business.

Q. 24. Collateral for what?

A. Possibly money loaned or paper discounted. I can't say which.

Q. 25. Loaned to whom?

A. I do not know.

Q. 26. Where were the Meherrin Valley Railroad Bonds and the Southern Telegraph Bonds kept prior to March 31st, 1885?

A. My impression is they were in the possession of Bain & Bro. held as collateral to be delivered to the Exchange National Bank when required. Kept in the safe of Bain & Bro., as far as I know. I don't know where they were kept.

Q. 27. Where were you when the agreement of Bain & Bro. of March 31st, 1885, was executed?

A. I couldn't say positively. I might have been in Norfolk or Portsmouth.

Q. 28. When did you first see that agreement in writing?

A. I never saw any agreement in writing.

Q. 29. When did you first know that such an agreement as that of March 31st, 1885, mentioned on page 7 of the plaintiff's printed bill was made?

A. The banking house of Bain & Bro. closed doors on April 2d, 1885. From that time to the present I have never investigated anything or been interviewed with regard to anything except to make a deed for myself and wife to cover my creditors alike. I didn't know anything about the agreement of March 31st, 1885, until I failed in business April 2d, 1885.

Q. 30. Did you have at that time any knowledge of the amount of the debts even approximately, due by Bain & Bro. to the Exchange National Bank?

A. I was not aware of the indebtedness of Bain & Bro. to the Exchange National Bank. I knew we owed them something.

Q. 31. To what deed do you refer in your answer to question 29?

A. I mean the deed made by Bain & Bro and joined in by the other parties to Wm. W. Old, John T. Griffin and John B. Jenkins, as trustees, for the benefit of our creditors.

Q. 32. You use the expression in speaking of that deed "to cover my creditors alike." What was your intention in regard to that in making that deed?

(NOTE.—The question objected to by counsel for the trustees on the ground that the instrument itself is the only admissible evidence of the intention of the party.)

A. To carry out in good faith what I said.

Q. 33 What had you said?

A. I said what was embodied in the deed.

Q. 34. Have you read that deed of April 6th, 1885, since that date?

A. Yes, sir; I have read a printed copy of it, which I presume is a fac simile of the original.

Q. 35. Where were you when you executed that deed?

A. In my own house at my residence

Q. 36. Who brought the said deed to you to be executed?

A. Norman Cassell, a notary public.

Q. 37. Was anyone with him; if so, who?

A. I do not remember that there was anyone accompanying him. If there was I do not remember it.

Q 38. At what time of day did he bring it?

A. I think it was between 12 M. and sunset. What hour particularly I cannot state.

Q. 39. How long did he stay?

A. He stayed long enough to interview my wife and myself regarding the deed, and asked us if we were willing to sign the deed, which we did and put ourselves on the curb-stone.

Q. 40. Did he read the deed to you and your wife?

A. I think he did. My recollection is that he did.

Q. 41. Did you read the deed yourself?

A. No, sir; I never read the deed; only a printed copy; I was present when the deed was read to my brother George.

Q. 42. Were you consulting with your counsel while he was preparing the deed at your brother Robert's house, from April 2d to April 6th, 1885?

A. I was present at my brother Robert's house, but never had an interview with any of the counsel whatever.

Q. 43. Who was managing for the firm the preparation of the deed?

A. I could not say positively.

Q. 44. Did you have anything to do with the preparation of that deed or any other deed prepared by counsel at your brother Robert's house between April 2d and April 6th, 1885?

A. Nothing more than heretofore stated.

Q. 45. Did you know when you executed that deed what property it conveyed?

A. I presumed it conveyed all property belonging to the firm of Bain & Bro. and all property belonging to the individual members of the firm, as stated before when I signed the deed and was put on the curb stone, or entitled to a seat on the curb stone.

Q 46. Did you know on the 6th of April, 1885, what property Bain & Bro. had purchased after your failure?

A. I did not.

Q. 47. Had you been consulted about the purchase of any such property?

A. If there was any such purchase I had not.

Q. 48. Then what property did you know Bain & Bro. had on April 6th, 1885?

A. To enumerate the number of houses that were owned by Bain & Bro. would be more than I could do; there was a quantity of them.

Q. 49. Then do you mean to say that you knew only of such property as Bain & Bro. had at the time of their failure April 2d, 1885?

A. That is about the bulk of my knowledge of the property that Bain & Bro. held at the time of their failure.

Q. 50. Did you at any time between the 2d and the 6th day of April, 1885, consent to pay any of your depositors in full?

A. I have never been requested to do so by any depositor of the firm of Bain & Bro., either as an individual or as a member of the firm, and would have spurned such an offer with contempt.

Q. 51. If it has been done since your failure, without your knowledge, do you repudiate the act?

A. I have no knowledge of any such transaction.

Q 52. Do you know of any check drawn by any of your depositors since the 2d day of April, 1885, which has been honored in full by your firm?

A. The banking house of Bain & Bro. has not been open for business since April 2d, 1885; therefore I am not cognizant of any check having been paid in full or otherwise by our firm since that date.

Q. 53. Do you know anything about your firm's allowing in full a check dated April 3d, 1885, now shown to you, for the sum of $31,885.70; examine check and say whether you do?

A. Referring to my answer to question 52, I now refer to said answer and say that this question in regard to this paper is fully answered in answer to that question.

Q. 54. Do you know anything of any notes received by Bain & Bro. from the Richmond Cedar Works through Wallace & Son after your failure?

A. I do not.

Q. 55. Were the transactions between Wallace & Son and the Richmond Cedar Works and between Wallace & Son and Bain & Bro., occurring after your failure, altogether unknown to you?

A. I don't know of any transaction of a business character that took place of Bain & Bro. after the failure of April 2d, 1885.

Q. 56. Do you know how any of the funds obtained by Bain & Bro. from the Exchange National Bank were invested?

A. I do not.

Q. 57. You were personally indebted to the Exchange National Bank by a note for $3,000; look at your answer filed in this cause and say how the money from said note was expended by you, and if for household furniture and effects; is all such property embraced in the inventory filed by the trustees?

A. I borrowed $3,000 from the Exchange National Bank and expect to pay it; I purchased a house for my father-in-law after the war ended, for which I assumed his indebtedness at the old Exchange Bank, the Bank of Virginia, the Farmers' Bank, Merchants' and Mechanics' Bank, Portsmouth Savings Fund Society of Portsmouth, and a part of that $3,000

borrowed from the Exchange National Bank was used to relieve m· of this debt; how much I can't say. (The witness here examines the inventory.) Yes, part of it was expended for household furniture and effects, and is embraced in the inventory filed by the trustees.

Q. 58. Take the said inventory and see if you can recall any other property purchased by Bain & Bro. or any one of the firm with funds obtained from the Exchange National Bank?

A. I can answer this question without examining the inventory; I cannot state that any particular piece of property was bought by money obtained from the Exchange National Bank; you can't separate dollars and cents when you put them in the same bin.

Q. 59. Do you know anything about the items entering into and composing the large daily cash balances carried on the book you used to keep called "the red ink cash?"

A. Yes, sir; at times, when I was attending to the business, I made a settlement on what is known as the little red ink cash book, until my health failed; I did not give any personal supervision to books or business for the last four years, consequently made up those statements from items brought me by clerks and book-keepers. (Witness now examines red ink cash book.) It is impossible to remember the items that entered into those balances; I got them from the book-keepers and clerks in the offices as far as I entered them in that book.

Q. 60. Do you know, then, even the general nature of the items composing the daily cash balance when you kept the little "red ink cash book?"

A. As I didn't keep the books of the office and asked for the data from the clerks in the office by which to make up the little red ink cash book referred to, I am not expected to know the items.

The counsel for trustees declining to cross-examine the witness, his deposition is here closed, and further this deponent saith not.

(Signed) JAS. G. BAIN.

The witness now, having fully testified in obedience to a summons in behalf of the plaintiff, desires here to protest that no fact or information as to his dealings with the Exchange National Bank of Norfolk, obtained by this examination, shall be used either directly or indirectly against him or others in the criminal proceedings now depending in this Court against him and others, the said examination having been directed to matters almost wholly irrelevant to the issues before the Master, and in large part personally conducted by one H. D. Bulkley, whose name is endorsed upon the indictments in said criminal proceedings as a witness for the United States, and who is now in the employ of the plaintiff as an expert accountant.

And further this deponent saith not.

JAS. G. BAIN.

NOTE BY COUNSEL FOR PLAINTIFF—In reply to the protest above filed

by James G Bain, the plaintiff here repeats his reply to that filed by R. T. K. Bain and George M. Bain, Jr.; except this, that it is of record and noted at the commencement of the deposition of James G. Bain that the expert accountant, H. D. Bulkley, then retired from the examination, and it is now noted by the Master that he remained absent from the room during the entire examination of the said James G. Bain.

[Signed] T. S. GARNETT,
Counsel for Plaintiff.

Deposition of H. D. BULKLEY, a witness produced by the plaintiff, to be read as evidence in his behalf in the cause now pending in the Circuit Court of the United States for the Eastern District of Virginia, between William H. Peters, Receiver of the Exchange National Bank of Norfolk, plaintiff, and Bain and Brothers' Trustees, defendants.

State your name, age, residence and occupation.

A. H. D. Bulkley, fifty-five years, expert accountant and business manager, residence New York.

Q. 1. How long have you been occupied as an expert accountant?

A. More or less for the last twenty years; during the past ten years have made a specialty of it and done nothing else.

Q. 2. State in general terms your experience in that profession.

A. Have had a varied one; with railroad and manufacturing corporations, banking institutions, &c.

Q. 3. Name some of the corporations or individuals for whom you have been so occupied.

A. The Harlem Bank of New York, whose affairs I examined and subsequently managed in voluntary liquidation; the Lackawana Iron and Coal Company of Scranton, Pa., with whom I was engaged for a period of fifteen months in examining and reorganizing its accounting affairs; the Northern Pacific Railroad Company, whose accounting department I entirely reorganized, occupying a period of eight months; the Louisville, New Albany and Chicago Railroad Company; The Pullman Palace Car Company; The Pullman Loan and Savings Bank; the United States Rolling Stock Company, and many others whose affairs I have examined critically and analyzed their accounts and annual reports.

Q. 4. Have you examined, as an expert accountant, the books and papers of the Exchange National Bank, now in the hands of the plaintiff in this cause, and how long were you so occupied?

A. I have, and as far as my recollection goes from June the 8th until August the 11th, 1885, together with my assistant.

Q. 5. Have you read the order of the court under which the Special Master is proceeding in this cause?

A. I have.

Q. 6. State in narrative form what you have discovered from the books of the Exchange National Bank concerning the official relations of George M. Bain, Jr., R. T. K. Bain and James G. Bain to that bank, and show by any extracts made by you from those books what those relations were.

A. The minute book of the bank on page 337 discloses the fact that on July 7th, 1870, Messrs Bain & Brother notified the Board of Directors that they and John B Davis, of Richmond, had purchased the stock of Governor Walker in said bank, and asked the assent of the board to the transfer of said stock. The board authorized the transfer of the stock on the payment of the indebtedness of Governor Walker to the bank, with certain exceptions, by the transfer of stock as follows: three hundred and sixty-five shares to John B. Davis, ninety-two to George M. Bain, Jr., ninety-one to James G. Bain, ninety-one to Thomas A. Bain and ninety-one to R. T. K. Bain. On July 8th, 1870, minute book, page 339, George

M. Bain was elected cashier. On January 9th, 1872, at a meeting of the stockholders—minute book, page 356—R. T. K. Bain was elected a director of the bank On the 12th of August, 1873—minute book, page 364—James G. Bain, Jr., was elected assistant cashier. On January 11th, 1870—minute book, page 372—R. T K. Bain and Thomas A. Bain were elected directors. On January 12th, 1881—minute book, page 395—James G. Bain was elected vice-president of the bank, having previously been elected on the 11th of January, 1881, as a director of the bank—page 394. On the 8th of January, 1884, Thomas Alexander Bain was elected a director—minute book, page 417—and these parties with the exception of Mr. Thos. A. Bain, who died in 1877, continued to act as directors of the bank until the 2d day of April, 1885.

Q. 7 Do the books of said bank show how and when any increase of the capital stock of said bank was made after 1870; if so, refer to any memorandum made by you upon your examination of said books, and state what the increase was, and who took shares of the increased stock?

A. On the 19th of October, 1872, minute book, page 339, a resolution was passed by the board of directors instructing the president and cashier to apply at once to the Comptroller of the Currency for permission to increase the capital stock of the bank a sum not to exceed one hundred thousand dollars. On the 29th of August, 1873, minute book, page 365, a resolution was offered instructing the president and cashier to proceed immediately to secure the increase in capital stock under the order of October 19th, 1872, according to their discretion, and to notify each stockholder of the increase, and allowing them to take their proportion of said increase. No further memorandum appears upon the minutes in regard to said increase, but on September 9th, 1873, the capital stock was increased, by entry on General Journal E, page 501, as follows; Sundry subscribers to new stock fifty thousand dollars; the names of the subscribers not given, and no actual money was paid on that day, the amount of fifty thousand dollars being carried as a cash item until the 14th of October, 1873, when Bain & Bro. gave their check on the Exchange National Bank for $25,000; John B. Whitehead gave his check on the bank for $15,000, and James H. Toomer and George M. Bain, Jr., gave their checks for $10,000, making $50,000, and certificates of stock, bearing date September 9th, 1873, were issued as follows; Number 182 in favor of Geo. M. Bain, Jr., for fifty shares; 181 in favor of James H. Toomer, for fifty shares; 179 in favor of John B. Whitehead, for one hundred and fifty shares, and No. 180 in favor of Bain & Bro., for two hundred and fifty shares, making a total of five hundred shares. The capital stock was farther increased on May 30th, 1874, one hundred thousand dollars, (see General Journal, folio 133,) and paid for by R. H. McDonald by a certified check on the Greenwich Bank of New York for $100,000; the actions of the board in reference thereto, as shown by the minute books, are all regular.

Q. 8. Show from said books how George M. Bain, Jr., purchased jointly, with John B. Whitehead any further interest in the stock of said bank?

A. On the 30th of December, 1875, John B. Whitehead and George M. Bain, Jr., purchased from Marshall Parks seventy-five shares of the capital stock of the Exchange National Bank, and they discounted their own

note at the Exchange National Bank, bearing date December 30th, 1875, payable ninety days after date, due on the 1st of April, 1876, for $8,338.63, the discount on which was $152.40, making the net proceeds $8,186.23, which amount was applied to the purchase of that seventy-five shares of stock. On February 9th, 1876, they also discounted their note at the Exchange National Bank, bearing date January 29th, 1876, payable sixty days after date, due on the 1st of April, 1876, for $1,630.82, the discount being $30.32, the proceeds, $1,612.50, were applied to the payment of the purchase of ten shares of the Exchange National Bank stock from Wm. Nichols, and five shares from the Lowell Savings Bank. When these two notes matured on the 1st of April, 1876, a new note for $10,130.16 was made and discounted, the proceeds of which, $9,971.45, were applied to the retirement of the two notes previously named, and on the maturity of the note of $10.130.15 it was renewed from time to time down to the 12th of January, 1885, having been increased to $11,500, which said note, due and payable on the 15th of July, 1885, is now held by the bank. The records of the bank do not show that the stock was pledged with the original notes or any renewals thereof, or that there was any collateral or other security with said note; and further that on some of the renewals of said note no interest whatever was paid; some at the rate of four per cent.; some at six and some at seven per cent. per annum.

Q. 9. Is there any evidence on the books or among the papers of said bank to indicate that those shares of capital stock of Bain & Bro. or of the individuals composing that firm, were ever pledged as security to the bank for any indebtedness of theirs, either firm or individual?

A. I have not been able to find any record of it.

Q. 10. Have you ascertained from the books of said bank what was the indebtedness of the firm of Bain & Brother to said bank on all accounts on the 3d day of April, 1885; if to, state it.

A. I have; the liability of Bain & Bro. to the Exchange National Bank on the 3d of April, 1885, was as follows: As makers of their single name paper without any record security, three hundred and twenty-five thousand dollars ($325,000.00); as indorsers on paper of theirs which had been discounted for their benefit, five hundred and ninety-three thousand two hundred and fifty-one dollars and ninety-nine cents ($593,251.99); on cash tickets, two hundred and eleven dollars ($211.00); on the receipt of W. H. C. Ellis, received from them as cash, thirteen hundred ninety-four dollars and ninety cents ($1,394.90); as makers of notes re-discounted, fifty thousand dollars ($50,000.00). In addition thereto there is a liability on the stock held by them as a firm and as individuals, in the Exchange National Bank, and also their liabilities under their guarantee given in the settlement made March 31, 1885.

Q. 11. Have you examined the books of Bain & Brother produced before the Master under the order in this case of November 11, 1885; if so, state what you ascertained as to the course of dealing between the firm of Bain & Brother and the said bank, as shown by a comparison of the books of the bank with the books of the firm of Bain & Brother.

A. I have examined the books produced before the Master, to a greater or less extent, but not so exhaustively as I did those of the Exchange National Bank. The firm of Bain & Brother were large borrowers from the

Exchange National Bank, and their books failed, as far as any of those that have been produced before the Master, to show a complete record of their transactions with said bank.

Q. 13. Of what value, in your judgment, are the books of account of Bain & Brother, as examined by you, in ascertaining the true state of the dealings between that firm and the bank, or as records of the financial transactions between them?

A. As far as I have examined them and compared them with the books of the Exchange National Bank, they are very far from showing a complete record of all the transactions between Bain & Brother and said bank and I cannot consider them in said connection as being of very great value.

Q. 13. What do you discover to be the condition of Bain & Brothers' books?

A. Very imperfect as records, with numerous clerical errors throughout and I do not believe that a correct balance sheet can be made from them as they now stand.

Q. 14. Describe the mode in which you find the accounts between Bain & Brother and the Exchange National Bank kept on the books of Bain & Brother?

A. I do not find any ledger account whatever kept on the books of Bain & Brother with the Exchange National Bank; their stub check books and pass books seem to be the only evidence of transactions with said bank among the books produced before the Master.

Q. 15. Do you find the stub check books and pass books incorrectly kept or not?

A. The pass books are a correct transcript of the account of Bain & Brother's individual ledger account on the books of the Exchange National Bank. There are many entries on the pass books which do not appear on the stub books, and I might also add that there are items on the stub books which do not appear on the pass books.

Q. 16. Are these items large or small, and how do the affect the account?

A. There are both large and small, but the large ones predominate; I cannot say exactly how the account would be affected unless it was analyzed fully in detail, but my judgment is that when they were entered, still the account would not balance and be in accord.

Q. 17. Do the books of Bain & Brother give any true account of the discount of their own paper at the Exchange National Bank?

A. I have been unable to find any record of the same on any books of Bain & Brother here. If there is any such record, I have no knowledge whatever of it; I have sought for it and cannot find it.

Q. 18. Now show how their account was kept on the books of the Exchange National Bank giving the different accounts borne on said books and explain the same.

A. First, an account was kept upon what is known as the individual ledgers to which deposits were credited and checks charged, and the proceeds of rediscounted paper also credited, as a general rule. Sometimes portions of discounts of their own paper were credited to the same account. They also had upon what was known as general ledger an account styled "Bain & Bro. pro forma account," against which was charged paper of Bain & Bro. and the paper of other parties endorsed by Bain &

Bro. and discounted for their benefit at the respective dates of their maturity, although the same was not paid. This account was adjusted from time to time by checks on their individual account and by the proceeds of their own notes and rediscounted paper, the rediscounted paper being to a very large extent, simply renewals from time to time. They also had what was known as a clearing house settlement, the daily balances of which, were carried as a cash item in the paying teller's cash, and the amounts due from Bain & Bro., from day to day, were counted as cash on hand.

Q 19. Illustrate this and show what was the average daily indebtedness of Bain & Bro. to the Exchange National Bank from the year 1879 until April 2d, 1885; say, for instance, on the clearing house settlement.

A. During the time that I was engaged in the examination of the books of the Exchange National Bank, Mr. Thomas Ott. the paying teller of the Exchange National Bank, who had charge of the clearing house settlements, prepared under my direction and supervision a statement of the clearing house settlements from the 2nd of January, 1879 to April 1st, 1885. and from that statement I find that the daily advance for six years and three months made by the Exchange National Bank to Bain & Bro. on clearing house settlements was fifty-eight thousand and eighty-two dollars and twenty-eight cents ($58.082.28). In this connection I would say that there is no recorded evidence that the Exchange National Bank had any security whatever for the advances made by it on clearing house settlements and during the latter part of 1884, especially, the amount advanced on this account grew to very large proportions, particularly so during the months of October, November and December of 1884, and January of 1885, reaching on the 24th of November, 1884, four hundred thousand and eighty eight dollars and one cent. ($400,038.01.) The loss of interest to the bank by reason of these advances at six per cent. would be twenty-one thousand seven hundred and eighty dollars and eighty six cents ($21,780.86.) and at nine per cent., which was about the customary rate of interest charged to customers of the bank, would be thirty-two thousand, six hundred and seventy-one dollars and twenty-nine cents, (32,671.29.)

Q. 20. Now say what was on the 24th day of November, 1884, the additional indebtedness of Bain & Bro. to the said bank on their "pro forma account?"

A Referring to my transcript of the pro forma account made from the books of the bank, I find the indebtedness on the 24th day of November, 1884, on said account to be three hundred and twelve thousand nine hundred and eighty-two dollars and seventy-one cents ($312,982.71.)

THURSDAY, March 25th, 1886.

Examination of H. D BULKLEY resumed.

Present: Charles T. Barry, Special Master; T. S. Garnett, counsel for the plaintiff; J. Alfred Jones, counsel for trustees: W. W. Old, trustee, and H. D. Bulkley, the witness.

Q. 21. Illustrate the manner of dealing between the Exchange National

Bank and Bain & Bro. in their own paper, together with their rediscounted paper, and show how the same were carried in their "pro forma account?"

A. The general practice was to carry through the regular discount books the paper of others discounted by the bank as coming from Bain & Bro, and the proceeds of which were carried to cash account, and then by cashier's checks transferred to the individual ledger account of Bain & Bro as deposits. Bain & Bro.'s own notes were not carried through the regular discount books of the bank, but were entered on what are known as balance and entry books; the proceeds were carried to the credit of cashier account and transferred in like manner through cashier's checks to the credit of Bain & Bro. on their individual ledger account. At the date of the respective maturities of both the rediscounted notes and Bain & Bro.'s own notes, the practice was to credit them to either notes and bills or inland bills, as the case might appear in the original charge to those accounts, and to charge the same to Bain & Bro.'s "pro forma account," where they stood as a debit charge until that account was adjusted by subsequent settlements, those settlements being made, as a general rule, by checks of Bain & Bro. on their individual ledger account, which account was oftentimes overdrawn at the date of these settlements and had been made good largely by new discounts of their own notes, and the paper of others endorsed by them carried through cashier account, as previously stated. This was not always the case, for frequently, when Bain & Bro.'s notes matured they were entered as paid on the day of their respective maturities, and the notes themselves carried as a cash item in the receiving teller's cash until they were taken up at some subsequent date by new discounts.

Q. 22. Take, for instance, the check of Bain & Bro., marked check No. 1, filed with question No. 54 of R. T. K. Bain's deposition, dated December 27th, 1884, for $316,375.00; say first whether that check appears anywhere on the stub book account of Bain & Bro., and then say what you ascertained from the books of the bank in regard to that check?

A. I have made diligent search through the stub books of Bain & Bro., and fail to find any record whatever of the check for $316,375.00, dated December 27th, 1884; the check itself recites on its face that it is for settlement of "pro forma to December 19th." The "pro forma account" of Bain & Bro. on the general ledger of the bank shows the amount to be due as of December 19th, 1884, $316,375. This balance due was composed of the past due paper of Bain & Bro. as follows:

No.	9505 3-8,	due	October	4th,	1884,	for.....	$ 20,000 00
"	9505 3-8,	"	"	"	"	"	20,000 00
"	9537 1-4,	"	"	6th,	"	"	20,000 00
"	9537 1-2,	"	"	13th,	"	"	20,000 00
"	9505 4-8,	"	"	18th,	"	"	20,000 00
"	9537 3-4,	"	"	22d,	"	"	20.000 00
"	9505 5-8,	"	November	1st,	"	"	20,000 00
"	9766 1-2,	"	"	"	"	"	25,000 00
"	9538 1-4,	"	"	6th,	"	"	20,000 00
"	9538 1-2,	"	"	13th,	"	"	20,000 00
"	9538 3-4,	"	"	22d,	"	"	20,000 00
"	9767 1-2,	"	December	3rd,	"	"	25,000 00
"	9801 1-4,	"	"	19th,	"	"	25,000 00
							$275,000 00

Of the past due notes of others endorsed by Bain & Bro., which had been discounted for them through cashier account, as follows:

No.	9830,	due	November	22d,	1884,	Maynard.....	$ 3,000 00
"	9894,	"	"	29th,	"	Sh'pers' Cmp. Co.	1,150 00
"	9833,	"	"	"	"	Hosier.....	1,600 00
"	9785,	"	December	1st,	"	S. & R. R. R. Co.	5,000 00
"	9862,	"	"	"	"	Hodges.....	300 00
"	9686,	"	"	5th,	"	Savage	3,000 00
"	9787,	"	"	"	"	Cottonhead	800 00
"	9707,	"	"	6th,	"	Wallace	16,000 00
"	9863,	"	"	8th,	"	Niemeyer	400 00
"	9864,	"	"	13th,	"	McCullough	500 00
"	9783,	"	"	16th,	"	Freedland.....	1,000 00
"	9834,	"	"	16th,	"	Trotman.....	4,000 00
"	9865,	"	"	17th,	"	Whitehurst.....	350 00
"	9866,	"	"	"	"	Culpeper.....	325 00
"	9895,	"	"	"	"	Sullivan.....	1,000 00
"	9919,	"	"	"	"	Berry.....	600 00
"	9896,	"	"	19th,	"	Norsworthy	1,750 00
							$ 41,375 00
Total.....							$316,375 00

When this check was charged to Bain & Bro.'s individual ledger account on the 27th of December, 1884, it left said account overdrawn at the close of business on that day $33,973.99, (see Individual Ledger A to F, No. 19.) On the 17th of December there was to the credit of Bain & Bro. on the individual ledger account, $3,612.12. On that day there was discounted for Bain & Bro. nine notes for $25,000 each, aggregating $225,000, interest at five per cent. per annum, the net proceeds being $220,475.69. (See Balance and Entry Book No. 9, p. 449.) Cashier's check No. 846 in favor of Bain & Bro. was given for this, and proceeds applied as follows; $189,475.69 to the credit of Bain & Bro. on Individual Ledger A to F, No. 19, and to the credit of the National Park Bank of

New York, (see General Journal M M, folio 367,) for the retirement of Bain & Bro.'s notes previously discounted by the National Park Bank for the account of the Exchange National Bank, to-wit, one due on the 16th of December, 1884, for $15,000, and the other due on the 19th of December, 1884, $20,000. On the 24th of December there were further discounts for Bain & Bro. of three notes of $25,000 each, aggregating $75,000, discounted at five per cent., net proceeds, $73,392.36, for the credit of cashier account, and was transferred by cashier's check No. 848 to the credit of Bain & Bro. (Individual Ledger A to F, No. 19.) There were deposits on the 24th, 26th and 27th of December to the credit of Bain & Bro., amounting to $27,073.03, and other checks besides the $316,375 were charged against such account between the 24th and 27th of December, amounting to $7,162.19, which left the account overdrawn, as previously stated. It will thus be seen that there are no practical reduction of the indebtedness of Bain & Brother to the Exchange National Bank; it was simply a shifting of it from one character of account to another.

ANALYSIS OF THIS PAGE.

Bal. Dec. 17.....	$ 3,612 12	Ck $316,375 00	
Part of disc't Dec. 17.	185,475 69	Other Cks..... 7,162 19	
Disc't Dec. 24.....	73,392 36	$323,537 19—Overd'ft....	$53,978 99
Depos. Dec. 24, &c...	27,078 03—$289,558 20	Ded. Dept. Dis.	289,558 20

Q. 23. Are there many similar transactions with Bain & Brother on the books of the bank and for what period of time do they so appear; specify a few of the larger amounts of their past due paper carried in the "Pro Forma Account" above described.

Q. by the witness—To describe as fully as I have already done in this one instance, similar transactions would occupy hours of the time of the court; I therefore request counsel to state whether it is his wish that in referring to other similar transactions, I should go as much into detail as I have already done.

Counsel replies to question of witness, that he desires him to specify similar tranasctions, but without minuteness of detail as above, except to say whether the names of makers of re-discounted paper of Bain & Brother appear constantly through these transactions.

A. The majority of the names in the re-discounted paper constantly reappear throughout the "Pro Forma Account," from its commencement in September, 1876, to its close in March, 1885. I call attention in this particular to note of Binford for $5,300, which is still in the possession of the Receiver; notes of Wallace, Greenville Land and Lumber Company, S. J. Armstrong, S. B. Carney, W. C. Dutton & Co., Etheredge & Brooks, J. C. Norsworthy, Richmond Cedar Works, W. B. Savage and others. On October 4th, 1884, Bain & Brother gave a check against their individual account for $285,000, which left their account overdrawn on that day $33,454.26. Their account had been put in credit by discounts made on the 4th of October, and previous thereto similar to those I have already described. On June 12th, 1884, check for $205,000 and on the same day discounts on the paper of others were made for the credit of cashier account the proceeds of which $106,331.35 were transferred to Bain & Bro.'s

credit by cashier's check 784 (see Discount Book, No. 9 page 79, Inland Bills 9591 to 9611 inclusive) the rate of discount on that batch of paper was 6 per cent. On the 30th of April, 1884, Bain & Brother gave a check for $290,000 on their individual account, $240,000 of which was applied as a credit on the "Pro Forma Account" and the balance went to retire other paper previously discounted in New York by the Hanover National Bank. On the same date Bain & Bro.'s twelve notes of $20,000 each were discounted for the credit of cashier account (see balance and entry book No. 9 page 150) and the net proceeds there of $237,000 was transferred to Bain & Brother's credit by cashier's check No. 772. The discount charged was an arbitrary one of $3,000 which is at the rate of three and six-tenths per cent. per annum. In this connection attention is directed to entry itself on the balance and entry books as failing to show fully whose paper was discounted on that day, and all of the entries in connection with the discounting of Bain & Bro.'s paper passed through the balance and entry books are more or less vague, and the evidence to show that the $240,000 discounted on April 30th, 1884 (balance and entry book 9, page 130), was Bain & Bro.'s is traced up through the other books of the bank. I could go on and illustrate many more similar transactions, varying perhaps a little in the details of treatment, but embodying the same general character, but it seems to me that this would be sufficient to illustrate the method of dealing.

Q. 24. That will do for that subject; now state the method of dealing with the indebtedness of Bain & Bro. with said bank as shown by items carried in the paying teller's cash on the clearing house settlements.

A. I have previously stated that during my examination of the Exchange National Bank's books last summer, Mr. Thomas Ott, the paying teller, who had charge of the clearing house settlements, prepared under my direction and supervision a statement of the clearing house settlements from the 2d of January, 1879, to the 1st of April, 1885, the balances prior to 1879 being small I did not deem it necessary to go back prior to that date. The firm of Bain & Bro. cleared through the Exchange National Bank and the practice was to add to the balance due on the day previous the checks redeemed by the Exchange Bank on Bain & Bro. received through the clearing house, and deduct from that amount any checks received by the Exchange National Bank either through the clearing house or in the ordinary course of their daily business and to make a new due bill for the balance which was counted in the paying teller's daily settlements as cash. Whenever the settlement showed a balance due to Bain & Bro. the balance was carried to their credit on the individual ledger account. This credit occurred infrequently, and only twenty-four times during the six years and three months covered by the statement prepared and all of which occurred prior to the 13th of July, 1880. These due bills were frequently reduced by checks on Bain & Bro.'s individual ledger account; some times these checks were good through balances to their credit in the regular way, but more frequently by discounts of Bain & Bro.'s paper through cashier account, thus showing that it was simply a shifting of the character of the obligation.

Q. 25. State what you ascertained from the books of the bank to be the method of dealing with Bain & Bro.'s indebtedness to the bank by items

carried in the receiving teller's cash and illustrate this by one or two cases in point.

A. In answer to a previous question I have stated that when Bain & Bro.'s notes, discounted by the Exchange National Bank, matured, they were not always charged to "Pro Forma Account," on the date of their respective maturities, but were entered up as paid, and carried by the receiving teller in his daily cash settlements as cash items. In illustration of this, I will state that on the 1st of May, 1880, Bain & Bro.'s note numbered 6584¾ maturing on that day was entered as paid on the collection book, and carried as a cash item in the receiving teller's cash. On the 6th of May Bain & Bro.'s note 6630¼ for $10,000 matured and was dealt with in like manner; on the 3d of June, 1880, Bain & Bro.'s note, 6631½, for $15,000, matured, and received similar treatment; on the 5th of June Bain & Bro.'s note, 6632½, matured, and was carried through the same process. The sum of these notes ($55,000) was carried as a cash item until the 24th of June, when No. 6687½ matured and was added thereto, making the cash item $75,000. On the 6th of July No. 6758½ for $15,000 was added thereto; on the 10th of July No. 6759½ was an additional accretion of $15,000, making the account of cash ticket at that date $105,000. Between the 16th of July and September 6th, inclusive, 1880, six other pieces of Bain & Bro.'s matured, aggregating $95,000, making the cash ticket at that date $200,000, and on the 13th and 18th of September two additional pieces of $15,000 each matured and were added thereto, making the total amount of past-due paper appearing in the receiving teller's cash as a cash item of $230,000. This was so carried until the 29th of September, 1880, when it was reduced to $105,000. The balance of $125,000 was further added thereto by other maturities between October 6th and 29th, inclusive, aggregating $60,000, making the cash ticket at the last named date $185,000. The method by which these reductions were made is as follows: On the 29th of September (General Journal A A, folio 130,) the National Park Bank is charged with discount $60,000, and on the same journal, same page, the Hanover National Bank is charged with discounts $60,000, aggregating $120,000. The entry does not recite whose paper it was, but from the correspondence between the Park and Hanover National and the Exchange National Bank, and their accounts current, I have ascertained that these were Bain & Bro.'s notes, discounted by those banks respectively to the credit of the Exchange National Bank, and bearing its endorsement. The banks were not credited with the discount on this paper until a much later date. The $120,000 charged to those banks respectively was applied as follows: $105,000 to the reduction of the cash items already described, and the balance of $15,000 to the settlement of Bain & Bro.'s note 6875½, due on the 29th of September, 1880. (See Daily Collection Book No. 10.) On the 1st November, 1880, (See General Journal A A, folio 354,) the National Park Bank is charged with discounts $49,077.00 and the Hanover National Bank with $49,083.21, making a total of $98,162.21. The entries on the general journal do not describe whose paper it was discounted, but I have ascertained in like manner as stated above that it was Bain & Brothers'. The proceeds of these discounts, $98,161.21, was applied as follows; $95,000 to the reduction of cash items, leaving a balance of $90,000 still due in the cash items, and

$3.162.21 was passed to the credit of Bain & Bro. as a deposit on the 1st of November, 1880. (See General Ledger A to F, No. 6.) This deposit appears on the Pass Book No. 2, and is also found entered upon the Stub Book No. 13, of Bain & Bro. with the Exchange National Bank. On the 21st of December, 1880, referring to Balance and Entry Book No. 5, it will be seen that Bain & Bro.'s seven notes for $20,000 each were discounted and the proceeds, $136,647.78, placed to the credit of cashier account, against which the cashier gave two checks, No. 346 in favor of Bain & Bro. for $97,826.12, which was used in the cancellation of the remainder of the $90,000 of cash items, and the balance of $7.826.12 placed to the credit of Bain & Bro. as a deposit. (See General Ledger A to F, No. 6.) This deposit is also found in Pass Book No. 2 and on Stub Book No. 13 of Bain & Bro. The other check, No. 247, for $38,821.66, was held until the 30th of December, 1880, when it was used for the reduction of other items in the receiving teller's cash. I could go on and recite many others, but I think this clearly illustrates. In this connection I would state that the discounts of Bain & Bro.'s paper at the New York banks and that shown on Balance and Entry Book No. 5, the proceeds of which were used to retire Bain & Bro.'s past due paper carried in the receiving teller's cash as cash items, do not appear on either the pass books or the stub books.

Q. 26. Illustrate by memoranda made by you from the books and papers of the bank during the summer of 1885 the mode of carrying in the receiving teller's cash certain drafts paid by the bank for purchases made by Bain & Bro., and show how you traced the same into the receiving teller's cash?

A. In the early part of 1884 Bain & Bro. purchased a cargo of guano which was received by the steamer Mount Edgecomb. Robert Herman & Co., of New York, were either the parties from whom the purchase was made direct, or the agents of the parties. They drew a draft on Bain & Bro. which was sent for collection to the Bank of Portsmouth; this draft on Bain & Bro. was marked good by George M. Bain, Jr., cashier of the Exchange National Bank, on the 15th day of February, 1884: was paid through the clearing house settlements. In the adjustment between the paying and receiving tellers of their daily settlements of that day this draft was transferred from the paying to the receiving teller, and was carried by the latter as a cash item from that date to the 20th of January, 1885, sometimes appearing as an item by itself and at other times consolidated with other items. It disappeared from the receiving teller's cash on the 20th of January, 1885; the Exchange National Bank having discounted for the credit of cashier account eight notes of Bain & Bro. for $25,000 each (see balance and entry book 9. p. 495), for the net proceeds of which, $196,541.68, he gave his check No. 9880, which was applied as follows: To the cancellation of the items carried in the receiving teller's cash, being the amount of the draft paid on the 15th of February, 1884, $59,725,97, and the balance of $136,813.71 was carried as a deposit to the credit of Bain & Bro. (individual ledger A to No. 19.) This deposit will also be found entered on stub book No. 13 and pass book 5. Bain & Bro. drew on the same day against said deposit a check for $130,000, which was applied to the reduction of clearing house balance. The bank received no

interest on this $59,725.97 during the period in which it was carried in the receiving teller's cash as a cash item, namely, 11 months and 5 days, and the rate of discount on the $200,000 of notes was 5 per cent. per annum. The loss of interest to the bank at 6 per cent. per annum on this $59,725.97 was $3,384.41. In my examination of Bain & Bro.'s accounts I find on ledger B, folio 90, under date of January 22d, 1885, the account of "guano ex Mount Edgecomb," charged with $63,184.29, which is the amount of the draft heretofore described, plus the discount on the $200,000 of notes, namely, $3,458.32. In January, 1881, Bain & Bro. received a cargo of guano per James Bain which was purchased through Alexander Brown & Sons, of Baltimore, who were the correspondents of the Exchange National Bank in that city. Alexander Brown & Sons sent to the Exchange National Bank a draft on Bain & Bro. for $50,511.70, being the amount of invoice for said cargo of guano; this draft was entered on the 18th of January, 1881, to the credit of Alexander Brown & Sons on the books of the Exchange National Bank and was carried as a cash item until March 17th, 1881, when Bain & Bro.'s three notes for $20,000 each were discounted to the credit of cashier account, and he gave his check No. 383 for the proceeds, $58,830, which was applied to the cancellation of the cash item $50,511.70 and the balance, $8,318.30, placed to the credit of Bain & Bro as a deposit (see individual ledger A to F, No. 7, pass book 2, and Bain & Bro.'s stub check book 13.) I find on Bain & Bro.'s ledger A, folio 272, this draft of $50.511.70 charged to the account of "guano ex James Bain."

Q. 27. What is shown by the books of Bain & Bro. and the list of debtors to Bain & Bro., filed by the trustees in their inventory in this cause, in regard to the sales of part of the cargo of guano ex Mount Edgecomb; state as fully as you can without unnecessary detail?

A. Schedule No. 7, as per inventory of the trustees, purports to be a statement of the amounts due from various parties for merchandise on open account aggregating $39,378.20. I have made an analyzation in part of this schedule from the books of Bain & Bro. and find the indebtedness reported to be due from various parties on open account to be composed in part of sales to the amount of guano received "ex Mount Edgecomb." Among the number I will recite:

Thomas Owens	$ 707 85
John W. Maynard	314 51
John T. Griffin	402 85
John Stewart	259 09
Cotton and Owens	414 29
P. Rodman	1,585 09
L. D. Ames	1,974 39
J. E. Ames	545 73
L. D. Bunting	632 74
Wm. H. Bunting	1,170 38
American Fertilizing Company	637 01
J. C. Taylor	630 00
Hines & Mansfield	320 06

There are also amounts due from W. G. and J. F. Maupin, Wallace &

Son and from the Beaton, Moore Prospect, Bowers Hill and Kay farms, as well as from some others, the amounts of which I am unable to give you at this time, not having completed that branch of the examination.

Q. 28. Explain what you have ascertained from the books of the bank as to the use of funds obtained from the said bank by either of the defendants in this cause individually or as members of the firm of Bain & Bro. in the purchase of Norfolk and Ouray Mining Company's stock?

A. On the 6th of August, 1881, (see balance and entry No. 6) Bain & Bro.'s two notes Nos. 7752½ and 7753½ for $20,000 each were discounted for the credit of cashier account; the net proceeds, $39,041.67, were applied by cashier's check No. 437 in part to the credit of Bain & Bro. (see individual ledger A to F 9,) to the extent of $21,741.67, and the balance of $17,300 passed to the credit of George M. Bain, Jr., treasurer of the Norfolk and Ouray Mining Company in settlement of collections for that company's account of paper of James G. Bain for $8,075. R. T. K. Bain for $8,075, and J. G. Wallace for $1,150, given for subscription to the preferred stock of the Norfolk and Ouray Mining Company. (See daily collection book, general ledger accounts No. 12.) On the 6th of August, 1881, John B. Whitehead and George M. Bain, Jr., had their note dated August 6th, 1881, and due February 9th, 1882, for $21,600 discounted at the Exchange National Bank (see discount book No. 8), the discount being an arbitrary sum of $625, which is about five and three-quarter per cent. per annum, the net proceeds of the same being $20,975. The proceeds of this note went to take up collections for the credit of George M. Bain, Jr., treasurer of the Norfolk and Ouray Mining Company (see collection book 12, general ledger account), as follows:

George M. Bain, Jr., for 324 shares Norfolk and Ouray Mining Company preferred stock, at twenty-five dollars per share	$ 8,100
George M. Bain Jr., trustee for 75 shares	1,875
T. A. Bain, 13 shares	325
George McK. Bain, 13 shares	325
John B. Whitehead, 414 shares	10,350
Making a total of 830 shares at $25 per share	$20,975

The 839 shares of stock, par value $100 each, were pledged with the note as collateral. On the 9th of February, 1882, a new note was made (see discount book 8) dated February 9th, 1882, payable six months after date, due August 13th, 1882, $30,580. The discount was arbitrary at about 6 per cent., $980, making proceeds $29,600. This was applied to the retirement of the original note for $21,600, and the balance, $8,000, was placed to the credit of the Baker Salvage Company (see collection book 13), being for the purchase by Whitehead and Bain of one hundred shares of the Baker Salvage Company stock at eighty cents. This stock was also pledged as collateral security of the note. On the maturity of this note, August, 1883, it was entered as paid and carried as a cash item until August 26, 1882, when a new note was given bearing that date and due February 28, 1883, for $31,200, the discount being arbitrary at about 4 per cent. per annum, $620, making the proceeds $30,580, which retired the cash item. This note of $31,200 was renewed from time to time with

a rate of discount from nothing to 4 per cent. per annum, and the last renewal thereof, with the collateral securities, is now held by the receiver.

Q. 29. Show similar transactions to that above explained and point out how the books and papers of the bank show the benefit to Bain & Bro. of a speculation in Norfolk and Western Railroad Company's stock?

A. In May, 1881, the Norfolk and Western Railroad Company was being reorganized, and Messrs. E. W. Clark & Co., of Philadelphia, sold to a syndicate of gentlemen in Norfolk 5,000 shares of the preferred stock of the new corporation at $33 per share, amounting to $175,000. Those purchases were settled for through the Exchange National Bank, who were the correspondents of Messrs. E. W. Clark & Co. Among the parties purchasing, Messrs. J. B. Whitehead and George M. Bain, Jr, the president and cashier of the Exchange National Bank, took 2,273 shares, and Mr. Burruss took 450 shares. Mr. Burruss seems to have paid but one installment of five dollars per share on his purchase, which amounted to $2,250; Messrs. Whitehead & Bain subsequently took his purchase off his hands. On the 14th of May, 1881, general journal C C, folio 384, call loans are charged with the call loan of John B Whitehead and George M. Bain, Jr., $93,055, and Messrs. S. W. Clark & Co. were credited the same day with the same amount, being the amount of purchase of 2,273 shares by Whitehead and Bain at thirty-five dollars per share and the balance due on the Burruss subscription, or 450 shares, $13,500. The stock of Burruss and Whitehead and Bain was pledged as security for the call loans. There seems to have been some tacit understanding that the parties to this syndicate should hold this stock and sell it together. On the 30th of May, 1881, sixteen days after this call loan was made, Messrs. J. W. Hardy & Sons, of New York sold 784 shares at $70, less their commission (one-eighth), making proceeds $54,782, and afterwards 50 shares of Burruss' stock was sold at 50, making 834 shares in all. I should have added also that a call loan was made to Burruss for $2,250. In the proceeds of this sale Whitehead and Bain had a four-sixth interest, which amounted to $38,188, which they applied as follows: $17,611 to the reduction of their call loan and $358 to the interest on the same at five per cent. per annum, and the amount, to wit, $17,969, was paid to Bain & Bro. on the 10th of June, 1881, as indicated by a check drawn by George M. Bain, Jr., cashier for the Norfolk and Western Railroad syndicate, on the Exchange National Bank; said check was certified and was paid through the clearing house settlement of the 14th of June, 1881, and recites in its face "Pay to Bain & Bro. two-sixths Norfolk and Western 834 shares." The renewal of the original note, which is in possession of the receiver, does not recite, nor do any records of the bank show that Bain & Bro. were interested in this transaction.

Q. 30. Was the indebtedness of Bain & Bro. to the bank concurrently carried on the several accounts "Individual Ledger" "pro forma," due bills in paying teller's cash and items in receiving teller's cash, up to the time of the suspension of the bank, and say to what extent the sum total reached at any one time.

A. It was, and also in "inland bills" and in call loans. The only date at which I can give you the entire indebtedness without going through a

preparation to make it up, is that of the 1st of April, 1885, which I gave you on yesterday in answer to some questions, but I can say in round figures that it would range from $750,000 to a million and a quarter dollars within, at least, the year 1884. The data for any specific date can be made up, if desired, but will involve considerable labor to do so. The figures named are intended to apply to the year 1884 and 1885.

Q. 31. Were the discounts of Bain & Bro's own paper and also of the paper endorsed by them, gradually increased from the beginning of such transactions to April, 1885. Give the usual size of their early and latter notes so discounted.

A. They were, commencing with five thousand dollars, they were increased to ten thousand, then to fifteen thousand, from that to twenty, and finally to twenty-five thousand dollars each.

Q. 32. And those figures prevailed at successive intervals through their discount?

A. They did.

Q. 33. Does their account in all its branches of the Exchange National Bank show a steady increase of indebtedness from year to year?

A. Taking them collectively it does. I mean to say that taking the various accounts as a whole, and giving them credit for anything that any of them might show they were entitled to, that their obligations to the bank, collectively, would be shown to be increased from year to year.

Q. 34. What collateral or other security, do you find was ever given by Bain & Bro. for their general indebtedness to the bank?

A. I have made special examination for any evidence that any collateral was placed with the Exchange National Bank as a collateral security for their general indebtedness. I have also made special enquiry of the receiver as to whether he has been able to find anything bearing upon this subject and he informs me that he has not. There were found by the receiver, among the papers of the bank some Exchange National Bank stock in favor of Bain & Bro., J. G. Bain, R. T. K. Bain, and George M. Bain, Jr.; also some Norfolk and Ouray Mining Company's stock. Some of the shares of the Exchange National Bank were assigned in blank, but none of the Norfolk and Ouray Mining Company shares, except those heretofore named as being specifically pledged with the note of $31,300, were assigned until a later date, and there is nothing with the stock itself, or upon notes of Bain & Brother to indicate that those stocks were pledged as collateral security for the general indebtedness of Bain & Bro. On the 22nd of July, 1885, Mr. Wm. H. Peters, the receiver, at my suggestion, sent 646 shares of Norfolk and Ouray Mining Company's stock in the name of of R. T. K. Bain, 646 in the name of J. G. Bain and 646 in the name of George M. Bain, Jr., and one hundred shares in the name of George M. Bain, Jr., trustee, to George M. Bain by special messenger with the request that the same be assigned; at the same time the 839 shares, previously spoken of, or such portion of it as was issued to the Bain family, were sent with same request. Mr. Bain had executed the transfers of those belonging with the $31,200 note and pledged with it as specific collateral, but declined to do so as regards the others, stating that they were not collateral for any obligations. I think Mr. Richard Wright was the messenger.

Q. 35. State what you ascertained in regard to the shares of Exchange National Bank stock standing in the name of Bain & Bro, and the individual members thereof, respectively, and say how many of such shares were found at the bank when you examined its books and papers and how many of such shares are missing.

A. I found certificate No. 240 for 332 shares, which is the original stock purchased from John B. Davis, unassigned to the bank, or in blank. No. 180 for 250 shares, which is the certificate issued at the date of the increase, September 9th, 1873, this certificate is transferred in blank, but the transfer is imperfect by reason of not being witnessed. I also find certificate No. 103 for 91 shares in favor of R. T. K. Bain, which is the certificate issued at the time of the purchase from Gov. Walker in 1870; this is transferred in blank, but the transfer is also imperfect by reason of not being witnessed. I find certificate No. 151 for 92 shares in favor of Geo. M. Bain, Jr., this certificate issued at the time of the purchase by Gov. Walker and is assigned in blank but defective for the same reason as stated above. I find certificate No. 152 for 91 shares, T. A. Bain and certificate 154 for 91 shares J. G. Bain, both of which were issued at the time of the purchase from Gov. Walker, they are assigned in blank and duly witnessed. The whole amounted to 947 shares, which appears by the stock book to be all the stock held by Bain & Bro. at the date of their suspension, namely: 582 shares; by J. G. Bain, 91 shares, R. T. K. Bain, 91 shares, Thomas A. Bain, 91 shares, but the stock ledger shows that George M. Bain, Jr. is the holder of 232 shares, only 92 of which are found in possession of the bank.

Adjourned until 10 o'clock A. M., March 26th.

THURSDAY, March 26th, 1886.

Deposition of H. D. Bulkley resumed.

Present: Charles T. Barry, Special Master; T. S. Garnett, counsel for the plaintiff; Richard Walke, Esq. and Jas. Alfred Jones, counsel for trustees; and H. D. Bulkley, the witness.

Q. 36. Is there any stock account showing the investments in stocks and bonds made by Bain & Bro. on the books of that firm?

A. I do not find any account on Bain & Bro.'s ledgers showing investments in stocks and bonds except on Ledger A folio 221, the purchase of Dismal Swamp Canal Co. bonds, under date December 18th, 1880, $2,100; on a small book filed with the Master, and marked O O, there is a statement which simply says "stocks $4,828.47." The last date at which the amount appears is July 31st, 1877; there is nothing on such record to indicate what securities this amount represented.

Q. 37. Is there any real estate account on Bain & Bro.'s books; if so, to what date does it extend, and is any general account of real estate kept after that?

A. The only place in which I find a real estate account opened is on the exhibit referred to above, and under date July 31st, 1877; the amount there stated is $93,811.87. There is nothing on said book to indicate the pieces of property which this amount represents, and I do not find at any subsequent date any real estate account, as such on Bain & Bro.'s books. I find on Ledgers A and B a number of accounts opened as against specific pieces of property; for illustration, Ledger A p. 582, Bower's Hill property; Ledger A folio 227 Beaton farm property; Ledger A folio 54, O'Niell farm; Ledger A. folio 474 Prospect farm; Ledger A folio 353 Long Point Marsh, and there may be some other accounts representing special pieces of property.

Q. 38. Do the books of Bain & Bro. anywhere show that they were stockholders or bondholders in any of the following corporations, to wit: Greenville Land and Lumber Company, Meherrin Valley Railroad Company, Southern Telegraph Company, Seaboard Cotton Compress Company, Norfolk and Ouray Mining Company, or the Chesapeake and Idaho Mining Company?

A. If any such accounts are shown upon their books anywhere I have been unable to find them.

Q. 39. Taking the books of Bain & Bro. as they now stand, are you able to prepare a complete and accurate statement, either of their account with the Exchange National Bank or of the assets of Bain & Bro. indicated in the inventory filed by the trustees?

A. Taking the books as they stand, I am not able to do either one or the other, nor do I believe it is within the range of human possibility to make such statements from the books as they stand.

Q. 40. Take, for instance, the last item in their cash tickler L, under date April 2d, 1885, to wit, $555,273.58, and say what you have ascertained from the books and papers of Bain & Bro. concerning that item?

A. This item of $555,273.84 purports to be, as shown upon Tickler L, the cash on hand at the commencement of business on the morning of April 2d, 1885. The actual amount of money transferred to the trustees, as per their report filed in this Court, is $14,125.26, which leaves a balance of $541,148.58 to be accounted for. Mr. R. T. K. Bain, in his deposition, has stated that this represented money drawn from time to time by individual members of the firm, investments made for the purchase of real estate and for various and sundry other disbursements covering a long period of time. On the 22d of March, 1886, in the presence of W. W. Old, one of the trustees of Bain & Bro, I visited the old banking house of Bain & Bro., at Portsmouth, and there found eight or ten drawers filled with envelopes tied together in packages, all of which, I was informed by Mr. Maupin, the former teller of Bain & Bro., entered into and formed a component part of the cash balance of April 2d, 1885. I examined one of these packages and found it to contain 31 envelopes, and these envelopes contained from three to five up to twenty and twenty-five receipted bills and memoranda for cash disbursements made during the years 1874 and 1875 for the purchase of pigs, seeds, grubbing, hedging, timber, manure, &c., for Prospect farm and also for labor on said farm; for the purchase of barrels and shells, for shoeing horses, purchasing harness, hot-beds and similar disbursements for O'Neill farm, aggregating the amount of, as per

notations on the outside of said envelopes, $8,908.92. I also examined, not so fully, three other packages, one aggregating $18,384.23 for expenditures made in 1874 for the O'Niell farm, the brick yard, purchase of horses, &c., &c.; one for expenditures in 1877 for brick yard amounting to $379.74; one for sundry expenditures in 1877 amounting to $2,838.39, which, in like manner, entered into the cash balance of the 2d of April, 1883. To have analyzed all the items which were found in these various drawers would have required the labor of weeks, and I therefore did not go farther with that investigation.

Q. 41. What is your opinion, as an expert accountant, of that mode of carrying a daily cash balance?

A. I must confess that in all my varied experience as an accountant I have never met with anything equal to it, and it presents the anomalous condition of affairs that the more a man spends the greater his assets appear, and I can see no reason to justify any such course of procedure.

Q. 42. Take another instance, show from the account of George M. Bain, Jr., executor, on Bain & Bro.'s books how the entry of $7,434.58 from that account went into "certificate account" and thence into wharf account, was accomplished?

A. According to Bain & Bro.'s Banking Ledger C, folio 65, it will be seen that on the 23d of December, 1872, the account of George M. Bain, Jr., executor, stood overdrawn $7,434.58, which amount was on that day transferred to the debit of certificate account. On folio 156 on the same ledger the amount of certificates outstanding at that date for which certificates had been issued was $6,398.95; the amount of $7,434.58, the George M. Bain, Jr., executor, overdraft, was continusly carried in certificate account until April 1st, 1885, (see Ledger G 2, folio 90,) when it was transferred to wharf account. (See Ledger G 1, folio 434.) There is nothing in the entries themselves to show the reason for the original transfer of the overdraft of George M. Bain, Jr., executor's account to certificate account, nor why it was subsequently transferred from certificate account to wharf account. Referring to the certificate account, on folio 156 Ledger C, it will be seen that when the transfer was made from George M. Bain, Jr, executor account to certificate account, such transfer would leave the certificate account in debit $1,035.63, whereas there were $6,398.92 of certificates outstanding. The certificate account is always a credit account, and the amount at its credit should properly represent the certificates at any given date; this it did not do. I can see no connection whatever between the account of George M Bain, Jr., executor, and certificate account and between certificate account and wharf account. In further explanation, in taking off the trial balances from the bank books of Bain & Bro. this $7,434.58 debit charge was invariably deducted from the balance of certificates outstanding at the date of such trial balances.

Q. 43. Again, look at Wallace & Son's account with Bain & Bro., on Ledger F 2, folio 434, and see if you can make any explanation of the last item by which that account was balanced December 31st, 1881, by credit of $151,259.55?

A. Referring to Ledger F 2, folio 434, it will be seen that the account of Wallace & Son on the 31st of December, 1881, was overdrawn $151,-

259.55; this amount was on that day credited to their account and transferred to sundries account, Ledger G 1, folio 410, January 1st, 1882, and so remained until January 31st, 1882, when it was transferred to wharf account, Ledger G 1, folio 436. There is nothing in the entries themselves to show connection between the accounts or why these transfers were made; they are simply credits to one account and debits to the other.

Q. 44. Now, say what amount of notes and bills, call loans, inland bills and suspended paper due to the Exchange National Bank from all sources was held among the assets of said bank at its failure, as shown by the books of said bank?

A. Notes and bills represented paper held by the bank and payable in Norfolk, inland bills represented notes and drafts payable out of Norfolk, and at the date of the bank suspension there were held by it:—

Notes and bills	$1,182,972 48
Call loans	179,466 90
Inland bills	921,653 66
Suspended paper	149,079 42
Making a total of	$2,433,172 46

Q. 45. Now, say what portion of all those assets just enumerated by you were evidenced by the paper of Bain & Bro., both as makers and endorsers, and by paper of firms or corportions in which they are either directly or indirectly interested?

A. Of the total amount, $2,433,172.46, there was—

Of Bain & Bro.'s single named paper	$ 325,000 00
On the paper of others endorsed by Bain & Bro. and discounted for their benefit	593,251 99
Note of J. G. Bain, endorsed by Bain & Bro	3,000 00
Three notes of George M. Bain, Jr., which are included in the above $593,251.99—$31,000—endorsed by Bain & Bro., the endorsement on these notes being in the handwriting of George M. Bain, Jr $31,000	
Four notes of Norfolk and Ouray Mining Co., aggregating	98,169 46
Two notes of S. S. Nottingham, aggregating $4,300.00, one of which, $3,000, is endorsed by Geo. M. Bain, Jr., and Bain & Bro	4,300 00
Notes of the Richmond Cedar Works for	96,000 00
Notes of Wm. H. Smith & Son for	117,000 00
Washington Improvement Company	35,000 00
Total	$1,271,721 45

—and they may have an interest in others of which I have no knowledge.

(NOTE—The item $31,000.00 in above tabulation is not added in the total, as it is included in the item $593,251.99.—STENOGRAPHER.)

Q. 46. After your full examination of the books and papers of the Exchange National Bank, and your comparison of the facts thereby ascertained with the books of Bain & Bro., what, in your opinion, as an expert

accountant, was the chief cause of the insolvency of the Exchange National Bank?

Mr. J. Alfred Jones, counsel for trustees, excepts to the above question as irrelevant and inadmissible.

A. The conclusion reached is that the primal causes of the failure of the Exchange National Bank were the extension of undue credits, principally to Bain & Bro., without adequate security or proper compensation; the engaging in private speculation by the officers of the bank with its funds for their own account, and in connection with Bain & Bro., and in violation of the National Bank Laws and sound principles of banking.

Further than this deponent saith not.

[Signed] H. D. BULKLEY.

FRIDAY, March 26th.

ALFRED P. THOM, ESQ., a witness introduced by the plaintiff, being duly sworn, deposed and said:

Q. 1. What is your age, residence and occupation?

A. Age 31, residence Norfolk, occupation, lawyer.

Q. 2. Are you a member of the law firm of Tunstall & Thom, and were you the standing counsel of the Exchange National Bank at and prior to its suspension?

A. I am a member of the law firm of Tunstall & Thom, and was at the time of the failure of the Exchange National Bank, and some time prior thereto, its counsel; we resigned on the 4th day of April, 1885, handing our resignation to the Bank Examiner temporarily in charge of the bank after its suspension, and sent a copy of it to the Comptroller of the Currency.

Q. 3. Did you afterwards render service in connection with the affairs of the bank and make an effort to have the indebtedness of Bain & Bro. secured to said bank?

A. I was especially retained by Messrs. Brown & Keyser shortly after my resignation, I cannot recall the exact dates, to represent an interest in the bank in connection with the indebtedness of Bain & Bro. to it, and to attempt to obtain from Bain & Bro. a settlement of that indebtedness or security for it.

Q. 4. State in narrative form what was the situation of affairs at the Exchange National Bank about the 31st of March, 1885, and describe what steps you then took to preserve the interests of the bank by effecting an agreement with Bain & Bro. and R. T. K. Bain, dated the 31st of March, 1885?

NOTE BY COUNSEL FOR PLAINTIFF.—Having been informed that the statement in the plaintiff's bill, touching the agreement of March 31st, 1885, might be construed by the witness who was then counsel for the said bank, as in some degree impeaching the propriety of his advice to his clients in making that settlement, counsel for the plaintiff desires to state that such was by no means the intention of the bill, on the contrary, in the condition of the affairs of the bank at that date his advice to the said bank was wise and proper, and did secure to the bank whatever can be realized from the sale of the securities delivered under that agreement of March 31st, 1885).

A. There had been various consultations by gentlemen interested in the bank for the purpose of devising some plan by which the danger that threatened the bank could be averted. Dr. McDonald, one of the largest stockholders, if not the largest, in the bank, had been in Norfolk for some days inquiring into the bank's affairs with a view, if possible, of rendering such assistance as the bank might require in order to avert disaster. My recollection is that on Tuesday morning, March 31st, Dr. McDonald had left the city, abandoning the idea of being able to save the bank. In that

condition of affairs the eyes of those having control of the bank's affairs were directed elsewhere, namely, to laying the condition of the bank before various bankers and banking institutions of the city and to seeing whether or not they would find it to their own interest to give the bank the assistance it needed. The two principal officers of the bank, namely, the president, Mr. Whitehead, and Mr. Geo. M. Bain, Jr., the cashier, were on that day physically broken down by the anxiety through which they had passed for some little time previous, and a larger than ordinary responsibility rested upon the counsel of the bank because much authority had to be assumed by the counsel, inasmuch as its officers were more or less incapacitated for business. On that day Mr. R. T. K. Bain came to my office, and deeming it wise under the circumstances, I made an agreement with him on behalf of the bank, which is found, I assume correctly copied, at page 7 of the amended bill in this cause. Mr. Bain would not agree to having incorporated in that agreement in writing any contract or pledge other than that which the writing itself contains, so far as other provisions were discussed between us, and would not agree to have incorporated the provision which I am about to mention.

(Objection made by Richard Walke, of counsel for trustees. The said Richard Walke objects to the witness offering in testimony anything tending to vary, add to or in any way affect the provisions of the written agreement of March 31st, 1885.)

The witness here disclaims any intention of giving any illegal testimony, but understands the question to involve the answer he was about to give, and he enquires of counsel for the plaintiff whether this is so, and whether he is required to proceed.

Judge Garnett, counsel for the plaintiff, replies that he does not understand the witness to be proceeding to give any illegal testimony, but if any agreement was made, as a condition or otherwise, accompanying the agreement of March 31st, 1885, the witness is desired to testify to the same.

Richard Walke, of counsel for the trustees, takes occasion here again to state that it is apparent from the statement which is made by counsel for the plaintiff that the testimony sought to be elicited from the witness is improper and illegal, and he objects to the witness' proposed testimony on this point.

To which counsel for the plaintiff here says that after the witness, R. T. K. Bain, had left the stand and finished the reading of his whole deposition, either of his own motion or by advice he filed a supplementary statement before the Master, going into a detailed answer to a question which he had previously declined to answer, and it is here proposed to rebut and explain the truth of the said R. T. K. Bain's testimony. The

witness is here requested by counsel for the plaintiff to proceed with his answer.

A. The provision which I was about to mention was as follows: That there should be an agreement that no assignment should be made, nor any deed should be made by Bain & Bro. that would make a preference against their indebtedness to the Exchange National Bank, and that the guarantee contained in the contract then under consideration, was in respect to the agreement as to making no preference against the bank, to be considered as among their liabilities to the bank. My recollection is distinct that for a long time Mr. Bain declined to give this pledge, and finally asked me whether I would receive the paper without the pledge and I replied that I would not, and thereupon the pledge was given, and the paper delivered, and the transaction consummated, so far as the delivery of the paper was concerned. I, personally, had nothing to do with the actual delivery of the securities to the bank, or with the surrender—I mean the manual surrender by the bank—of the paper of Bain & Bro. to them. Afterwards, namely, during the afternoon of the same day, I think it was, a meeting of the board of directors of the bank was held in the upper room of the bank, over the president's office, at which Mr. R. T. K. Bain and others were present, and Mr. Bain asked me—we two, at the time, being some little distance from the others of the party—to release him from that pledge. I thereupon called up Mr. Tunstall, my partner, who was also in the room, and detailed to him in Mr. Bain's presence the agreement which Mr. Bain and myself had made that morning, and which is substantially detailed above, and asked him if he thought, acting for the bank as we were, that we had any right to release the pledge? He replied that he did not think we had, and we declined to do so.

(Mr. Walke, of counsel for the trustees, herein excepts to the above answer of the witness, in so far as the same in any way tends to add to, vary, or contradict the written agreement of March 31st, 1885.)

Mr. Thom, the witness, adds that "of course I should have had that provision incorporated in the writing if Mr. Bain would have consented to so incorporate it, but he declined to do so, and I adopted the next best course, deeming that the arrangement was a wise and advantageous one for the bank."

Q. 5. And do you say distinctly that R. T. K. Bain was informed then and there by you that you would not take the agreement of March 31, 1885, without his said pledge at the same time?

(Mr. Walke, of counsel for the trustees, objects to this question for the reason above given in his objection to parts of the preceding answer, namely, that it tends to vary, add to, and contradict the written agreement of March 31st, 1885.)

A. Yes.

(The answer also objected to for the same reason by counsel for the trustees.)

Q. Now state what steps you afterwards took to effect the security of the debts of Bain & Bro. to the Exchange National Bank, and with what result?

A. I suggested to my partner, Mr. Tunstall, on the 2d day of April, the day of the failure of the bank, and shortly after its doors were closed, to go to Portsmouth and see Mr. R. T. K. Bain for the purpose of getting him to carry out the pledge which he had given me. Mr. Tunstall left the office for that purpose, and after a while returned, saying (As to what Mr. Tunstall said objected to by counsel for the trustees as being hearsay and improper testimony.) that Mr. Bain desired before doing anything to communicate with his counsel, who was in Princess Anne, and could not be communicated with. Having learned that Mr. Old was being consulted by Mr. Bain as to his matters, I went to Mr. Old's office on the morning of the 3d of April, I think, and told him that I understood that he was Mr. Bain's counsel and that I desired to call his attention to the pledge that Mr. Bain had given me not to make any preferences against the indebtedness of Bain & Bro. to the Exchange National Bank, and I think I also said that the guarantee given in the paper referred to was to be considered as a part of the indebtedness and that I would like for him to see as far as he could properly do so that that pledge was carried out by Mr. Bain in any arrangement of the matters of Bain & Bro. My impression is that Mr. Old answered on that occasion that he had not had sufficient time to look into the affairs of Bain & Bro. to come to any definite conclusion in reference to them; that he would be engaged in that investigation and, I think he said, that he would call Mr Bain's attention to what I said and see what he had to say. I went again the next morning, I think it was, to see Mr. Old in reference to the same matter and went over substantially the same ground indicating my very decided wish and opinion that the pledge should be at once respected and carried out. Mr. Old substantially said that he did not know but what Mr. Bain would take a different view of it from what I did, from his conversation with him and that the position that he, Mr. Old, took upon the matter was that it was a question which Mr. Bain himself should settle; that he, Old, would advise him as to all his legal rights, but that he regarded this as a question possessing a moral quality, and on questions of morals Mr. Bain must be his own counsellor and guide, and that he declined to advise him on that subject as to whether or not he should carry that out; it was a question of propriety for Mr. Bain himself to settle, but suggested, if I wanted to have anything more to say about it, that I go and see Mr. Bain myself. On Saturday evening, the 4th of April, I went to see Mr. Bain at his own house in Portsmouth. He came into the room in company with his son; I announced the purpose of my visit to be to remind him of the pledge which he had given me and to demand that it should be carried out. (Of course I am giving substantially what occurred and do not pretend to state the exact language.) Mr. Bain in response declined to give me any satisfaction whatever, and I left with the conviction that he was about to violate his pledge. I then attempted to work through Mr. George M. Bain, Jr., the cashier of the bank, and to prevent his signature to any deed that did not respect and carry out the pledge that had been given me. I went to his house several times for the purpose of bringing

about this result. I saw his son on the occasion of all my visits, I think, and finally, on Monday morning I went over and was invited up into Mr. Geo. M. Bain's sick chamber, where he was lying in his bed; there I detailed to him the occurrences about the pledge, substantially I presume, as I have narrated them here and told him that I was convinced that his brother, Mr. R. T. K. Bain, was about to violate that pledge and that I desired him to refuse to concur in any such violation. He expressed an unwillingness to believe that his brother was going to do anything of the sort, but seemed to be at a loss to know what to do himself, inasmuch as he was in great distress of mind and body and said that all he wanted to do was to do right and he desired advice on what was right. I told him that I represented an antagonistic interest in law and one that made it impossible for me to act as his adviser in the matter, but urged upon him the great wrong of the violation of the pledge by his brother or at his brother's instance, and that I was confident that it was about to be done, and I here repeat that he seemed to think that it was incomprehensible that he was about to violate any such pledge. Major Kirkpatrick, of Lynchburg, was invited into the room while I was there to talk over the matter with Mr. Bain and he appeared to think that circumstances might have intervened since the pledge was given that would justify Mr. R. T. K. Bain and the others in taking a different view of the matter from that which was taken when the pledge was given. I distinctly disagreed with Mr. Kirkpatrick,and urged in every way that I could that I should be allowed to see the deed before it was executed. The interview finally ended, and I came over to the bank examiners, who were then in charge of the Exchange National Bank, and requested them to get Mr. Toomer, who was in their employ, to go over and see Mr. Geo. Bain, and to use his influence against his making any deed prejudicial to the bank. I will state that at the time I was at Mr. Bain's house Mr. Robert Bain was there also. Later in the day, Judge Heath, who had also been employed by the bank examiners in connection with the same matter, and myself went again to Portsmouth and met Mr. Jas. G. Bain, and went to his house, and there we sat and talked to Mr. Jim Bain for some time, and told him the object of our visit to Portsmouth, requesting him to go over to Mr. George Bain's, and I think, to ask one of his sons to come over to see us. Mr. James Bain went, but we waited without result for some time, and then went over, and were shown into the parlor at Mr. George Bain's, and young George Bain finally came down into the parlor and told us that the deed was executed. This was in the afternoon of the 6th. We came back to Norfolk after hearing the deed was done. We then concluded that we would try to institute a suit to set aside the deed that had already been made, but not recorded, under the decision of Judge Hughes that a deed was void until recorded as to creditors, and that if we brought our suit before it was recorded we would get a lien, but of course everything depended upon our great haste. I went to Judge Blow and explained to him the exigency of the occasion and asked him if he would hear an application for injunction. He said that he had been approached by Mr. Marshall, of Portsmouth, and requested not to act without giving notice, and inasmuch as taking the time to give notice would have been fatal to us, under those circumstances, I went to Judge Brooke and found out that he had been also approached by Mr. Marshall with the

same request. Judge Hughes was then in Richmond, and we attempted to discover whether there was any way of getting to Richmond that night by chartering a train or otherwise and found it was impossible. We then attempted to communicate by telegram with Judge Hughes so that we might accomplish our object, if possible, in that way, but Judge Hughes was out, and did not get the telegram until late at night, and the next morning I was called to Richmond on other business, and as I was going down Granby street to take the early boat I met Mr. Old on the street and he looked like he was coming home, and I assumed the deed was recorded. We afterwards took more deliberately under consideration the question of an attack upon the deed, but before we took any other action, the receiver was appointed and our connection with the case practically ceased.

(Counsel for the trustees except to the above answer of the witness on the ground that it relates to transactions in reference to a parole pledge, or an attempt made by him to carry out a parole pledge tending to vary and contradict the written agreement of March 31, 1885.)

Adjourned until 10 o'clock March 27th.

SATURDAY, March 27th.

Deposition of Alfred P. Thom, Esq., resumed.

Present: Chas. T. Barry, Special Master; Judge T. S. Garnett, counsel for plaintiff; Mr. Richard Walke and J. Alfred Jones, Esq., of counsel for trustees, and W. W. Old, one of the trustees.

Judge Garnett, counsel for plaintiff, replies here to the objection of counsel for trustees, recorded at the close of yesterday's examination, that the same is not well taken, for the reason that the testimony of Mr. Thom proves a parole promise of Mr. R. T. K. Bain made in regard to the balance of the indebtedness of Bain & Bro. to the said bank, after taking into consideration the sale made to the bank by the agreement of March 31st, 1885, and in nowise contradicts or varies that instrument.

Q. 7. In your interview with Mr. George M. Bain, Jr., at his house in Portsmouth, as mentioned by you yesterday, state whether he expressed his wishes in regard to carrying out the promise made by his brother, R. T. K. Bain, or not?

A. As far as I can now remember, his expressions indicated that he thought it impossible that his brother could be considering the violation of the pledge. I cannot say that he further expressed a direct wish on the subject, but he expressed no wish that the pledge should be violated, and the whole tenor of the interview was to the effect above given, that it seemed impossible to convince him that any such thing was in contemplation as a breach of the pledge. I would like to state here that Mr. Geo. Bain impressed me on that occasion as desiring to act in the most consci-

entious manner in reference to the arrangement that should be made about the indebtedness of the firm.

Q. 8. That was on what date?

A. That was on April the 6th (Monday.)

Q. 9. About what time in the day?

A. I cannot now recall the exact hour, but I should imagine that it was in the neighborhood of 12 o'clock; it was before the deed was executed; it may have been earlier in the morning.

Q. 10. Do you know whether he had then seen the deed which he afterwards executed?

A. I do not know of my own knowledge whether he had or not, but from his expressions I would judge that he had not.

Q. 11. Did you learn from him or from any other source which one of the firm was then managing the matter of the assignment of Bain & Bro.?

A. I think it is safe to say that Mr. R. T. K. Bain was managing it, and this I say from my experience derived in the matter. Of course a great deal of what I know is hear-say in reference to that. The conversation with Mr. George Bain and the conversation with Mr. James Bain both pointed to that fact. but I cannot recall any expressions of either that definitely stated that R. T. K. Bain was managing the preparation of the assignment. I think that Mr. George Bain had not had time after I first saw him to have been in consultation with counsel sufficient for his superintending the preparation of the deed.

Cross-examination by Richard Walke, Esq., of counsel for trustees:

Richard Walke, of counsel for trustees, here states that in proceeding to cross-examine the witness he does not waive any exceptions heretofore taken to the witnesses' testimony in chief, but expressly reserves the benefit of all such exceptions.

Q 1. Did you not consider it as very desirable for the Exchange National Bank on the 31st of March, 1885, to receive the stock and bonds set out in the agreement of that date and to give up to Bain & Bro. their indebtedness to the extent of $570,000?

A. As I understood the indebtedness to be surrendered; it was the unsecured indebtedness, and they had only the personal responsibility of Bain & Bro to look to for payment, and under these circumstances I thought it eminently desirable for the bank to make the arrangement set out in the paper. I would say in addition that it would be observed from that paper that the indebtedness of Bain & Bro. was retained practically; that is, so much of it as exceeded the value of the property taken in giving the guarantee that was required of them in the paper that the property should bring the amount at which the bank took it whenever it should be placed upon the market, and therefore made Bain & Bro. personally responsible for any difference that might appear between the actual value of stocks when realized upon by the bank and the amount at which they were taken

from Bain & Bro., and the practical result was to obtain a certain amount of assets for what appeared to be, to say the least, unreliable liabilities. I understand that the bank passed over to Bain & Bro only unsecured notes, due bills and paper of that kind in payment for the said property.

Q. 2. Was it not the intent of the agreement of March 31st, 1885, that the evidences of that indebtedness of $570,000 should be delivered to Bain & Bro. upon the execution and delivery of that agreement?

A. Certainly; it is proper for me to say that in surrendering this amount of unsecured paper the bank acted by my advice I did not actually see nor actually choose the paper to be surrendered; I merely, as I recollect, described the paper to be surrendered as unsecured liabilities of Bain & Bro.

Q. 3. The amended bill on page 27 states as follows: "Accordingly, upon the delivery of the said agreement to the bank, said Bain & Bro. were wrongfully and fraudulently permitted by said George M. Bain, Jr., cashier, to withdraw from the said bank and to have marked as cancelled and paid the following items of their debt," mentioning the different items making up the sum of $570,000; please state in express language, although you have already in effect stated it, whether or not there was any fraud in the delivery to Bain & Bro. or in the withdrawal by Bain & Bro. of the said items of indebtedness?

A. As I have stated, I did not know, and do not now know, except by hear-say, what the items of indebtedness withdrawn were, but assuming them to belong to the class of unsecured paper, as I understand is the case, there was no impropriety in the act of Mr. George M. Bain in allowing the withdrawal of that paper, but it was done upon my express advice. At this time it is proper to state that the chief officers of the bank were broken down mentally and physically, and Mr. Whitehead, the president, had gone home sick, I think this very day, and a much larger responsibility than ordinary devolved upon the counsel of the bank, and deeming this settlement, or this arrangement, very desirable for the interests of the bank, I advised it, and under my advice, as I have stated, certain unsecured paper of Bain & Bro. was to be released to them under the terms of that agreement, and the delivery of any such by Mr. George Bain was in accordance with an agreement which I in effect advised him was an advantageous one for the bank. I mean by the foregoing to say that there was no fraud in the allowance by George M. Bain, Jr., or in the withdrawal by Bain & Bro. of unsecured paper of Bain & Bro. under the terms of that agreement. I mean to confine this statement to the actual withdrawal of the paper, and to dissociate it from the question of pledge which is mentioned in my direct examination.

Q. 4. In your direct testimony you have referred to a promise or pledge made by Bain & Bro. or by R. T. K. Bain for Bain & Bro.; please state whether or not you regarded that as a legal part of the assignment of March 31st, 1885, or was the taking of it done by you because it was the best that you could do?

A. I unquestionably accepted the parole pledge in connection with the written agreement as the last resort and as the best I could do under the circumstances. Mr. Bain, as I have stated, declined to incorporate the pledge in the written part of the agreement. I felt that the pledge would

give me a strong hold upon Mr. Bain, and I hoped that it would not be ruthlessly violated. As to the legal position that I took, I do not know that my view on that subject is important, but I will state that I considered the failure to obtain the incorporation of the pledge in the written part of the agreement as depriving me of great legal advantage, and probably putting me in a position where I would not be able to appeal to the courts to have the pledge specifically carried out and enforced. As well as I can remember, substantially, the position that I regarded myself in at the time was not one of particular legal merit, but as one in which I could appeal to the conscience of the man who had made the pledge, and there was an undercurrent. I have no doubt, in my estimate of the whole matter that I would have the strong support and assistance of Mr. Geo. M. Bain, Jr., cashier, who, I anticipated, on account of his peculiar relation to the bank, would insist upon the pledge being religiously kept, if no better provision were made for the bank than the pledge indicated.

Q. 5. Did you tell Mr. Old in the course of a conversation that you have testified to with him that you had no hold on Bain, and that you wanted him to use his influence in getting him to include the bank in the deed?

A. I cannot positively recollect, but should not be surprised if I did, as that was about the attitude I held in the matter. I regarded, I presume, the pledge as a makeweight, but not one to which I could appeal with the assurance of success in court.

Q. 6. Did not Mr. Old take the ground with you that the securing of the bank by Bain & Bro. in the deed and the carrying out of the pledge was a question of morals and not of law, which, under the circumstances, he would not undertake to advise Mr. Bain about?

A. He did.

Q. 7. And you never asserted to him, did you, or claimed that it was any different question from what he regarded it?

A. As I have said, the exact attitude which I assumed with Mr. Old in reference to the legal merits of the matter I cannot now with definiteness recall, but I assume that I placed the matter very much on the ground indicated in my last answer with him. Mr. Old was distinctly of the opinion, as expressed to me, that the question of the breach of that pledge was a question of propriety of personal conduct and of morality to be decided by Mr. Bain alone; that he was advising Mr. Bain about his legal rights, and any question involving his legal rights which should arise he would advise him about, but he did not feel called upon or inclined to go beyond the sphere of strict legal duties and attempt to solve questions of what he regarded as those of mere propriety of personal conduct or morality for his client.

Q. 8. And have you not repeatedly expressed the opinion to Mr. Old since that time, and since those conversations, that the failure to keep that promise or pledge furnished, in your opinion, no ground of attack upon the deed or of fraud?

(Counsel for the plaintiff objects to this question and any answer thereto, as it seeks the expression of a legal opinion and is not relevant evidence.)

Q. 9. Have you not repeatedly expressed the opinion to Mr. Old since that time, and since those conversations with him, that the failure to keep the promise or pledge furnished no ground of attack upon the deed upon the ground of fraud?

(The same objection noted by counsel for the plaintiff.)

A Since my connection with the matter as counsel has ceased I have frequently spoken of the legal merits of this particular matter to people whenever the question would arise, and I have conversed on the subject with Mr. Old and with Mr. Walke also, and I have expressed to them, I suppose, what I felt on the strict legal merits of this matter—that it was not a ground for setting aside the deed for fraud. That was a mere legal idea that I was expressing, and is contradistinguished from my idea of the moral turpitude involved in the transaction. I would like to repeat here a little more clearly than I have previously done that I assumed that the relation borne to the bank by the firm of Bain & Bro. and all its members would be some guarantee to me that through the medium of that pledge I would be able to reap a substantial benefit to the bank, and inasmuch as it was all I could do, having attempted to get it in better form, and for the further reason that I considered the transaction of the acquisition of the securities eminently desirable for the bank, I felt that I was justified in taking a pledge in this form rather than not get anything at all.

Q. 10. You have referred in your direct examination to Major Kirkpatrick being present in the room of Mr. Geo. M. Bain, Jr., at your interview with Mr. Bain on the 6th of April, 1885; please state whether or not Mr. Kirkpatrick is a lawyer and what position he took in regard to the subject-matter of your interview upon that occasion?

(Counsel for the plaintiff objects to the question as seeking to obtain at second-hand a hear-say and legal opinion, and not any evidence material or relevant to the issues in this cause.)

Mr. Walke, of counsel for the trustees, replies that the object of the question is different from that which seems to be understood by counsel for plaintiff; it is for the purpose of showing what advice was then given by Mr. Kirkpatrick to Mr. George M. Bain, Jr., and is a part of the *res gestae* of the conversation, and heretofore testified to by Mr. Thom.

(To which the plaintiff's counsel replies that no foundation has been laid for introducing the advice or opinion given by Maj. T. J. Kirkpatrick, nor has he been referred to as counsel for Bain & Bro. during that eventful period.)

A. Maj. Kirkpatrick was in the room during a part of my interview with Mr Bain, being called into the room for the purpose of participating in it by Mr. Bain or some of the family. Mr. Bain seemed to be somewhat at sea as to the matter of all his affairs, and Maj. K. was called in, I assume, for the purpose of advising in the premises, although not

strictly as counsel. I am under the impression, but unable to say positively, that he said he could not act in that capacity, but he did participate in the conversation, and when I was urging my view of that pledge and the absolute impropriety and wrong of its violation by Mr. R. T. K. Bain, or at his instance, Mr. Kirkpatrick, without taking as I recollect, any positive and decided position, seemed inclined to express the view that possibly Mr. R. T. K. Bain, upon thinking over all his affairs might have concluded that as the Exchange National Bank had already gotten the benefit of the assets of Bain & Bro. represented by the securities, delivered up under the agreement of March 31st, 1885, that now possibly it was his duty to consider other calls upon him and that those duties might be of such imperative character as to justify him in taking the view of the pledge that he seemed to be inclined to take. to which view or to the suggestion of which view I replied, stating my side of the matter, and Mr. Kirkpatrick seemed disinclined to take any very prominent part in the matter, and I think said little else, but withdrew. In answer to a part of this question, I would state that Mr Kirkpatrick is a lawyer of the city of Lynchburg.

Q. 11. You have referred in your answer to one of the questions of the direct examination to a decision of Judge Hughes as furnishing a ground upon which you thought on April 6th, 1885, of bringing a suit before the recordation of the deed; please say what that decision was and explain its bearing upon the contemplated suit?

A. The decision was that of Shufeldt vs. Jenkins to be found reported in the Virginia Law Journal for December, 1884, vol. 8, page 709. The position there taken by the court is that a deed of trust is void as to creditors and others until recorded and by the filing of a bill and the judicial custody of the property a lien is obtained upon the property, which lien, if the bill is filed and the property taken possession of prior to the recordation of the deed, antedates all the rights created by the deed. This was of course only one of the positions proposed to be taken in the attack.

Redirect examination.

Q. 1. Was Mr. Geo. M. Bain, Jr. present at the bank on the 31st March, 1882, and did he personally superintend the delivery of the evidences of indebtedness of Bain & Bro. amounting to $570.000 under the agreement of that date?

A. Mr. Geo. M. Bain, Jr. was personally present at the bank at the date named and while I did not see him deliver the notes and papers referred to or personally superintend its being done, still I am confident that he did, because when I went into the bank and inquired into the matter he informed me that it had been done; I think he received from me the paper of the 31st March, 1885. Mr. R. T. K. Bain delivered the paper to me asking me to get for him from Mr. George M. Bain the pa-

pers to be delivered up and I went in and applied to Mr. Geo. M. Bain for the papers and he said the matter had been attended to.

Q. 2. Were you informed either before, or at time, or after that agreement of March 31st, 1885, either by any member of the firm of Bain & Bro. or by George M. Bain, Jr., cashier, that the securities therein mentioned were already held as security by the bank for the general indebtedness of Bain & Bro.?

A. I most assuredly was not and do not understand such to have been the case.

Q. 3. Why was the agreement of Mareh 31st, 1885, signed both by Bain & Bro. and R. T. K. Bain individually?

A. Because my first requirement was that it should be signed in the firm name and by each of the partners. Mr. R. T. K. Bain signed the firm name and then his own, and then insisted that that was sufficient inasmuch as he had a right to sign the firm name and I saw no reason for exacting any further signatures under that view of the case.

Q. 4. Supposing that the securities mentioned in the agreement of March 31st, 1885, could be made to realize $570,000 state about what was the further indebtedness of Bain & Bro. at that date which you were trying to secure to the bank?

A. I cannot state it in figures, nor even approximately, except from subsequent developement; the problem to which I was addressing my efforts was not to ascertain the amount of the indebtedness but to obtain securities for it. I did not understand the amount of indebtedness to be a question about which there was any doubt between the Bains and the bank and the important matter as I understood it, was to try and get something to secure it.

Q 5. Did either member of the firm at that time inform you even approximately, of their large indebtedness to the bank?

A. There were one or more conferences among those interested in the bank at which I was present, and while I cannot now recall figures, the question of indebedness which the bank had to provide for and secure was discussed, and among others, the immense indebtedness of Bain & Bro., and the question of securing it especially was discussed as a preliminary to any arrangement that could suggest itself to save the bank. I do not remember figures, and I do not know whether figures were more than approximately mentioned at the conference referred to; Mr. Robert and Mr. George Bain were both present. The particular conference to which I refer took place on the night of the 30th of March. I would say that in reaching an idea of the assets which the bank held in the way of indebtedness to it, paper as large as and exceeding ten thousand dollars was discussed, a list of the smaller loans of the bank could not readily be obtained in the short time at the disposal of those who were preparing the list.

Q. 6. Where was the conference of March 30th, 1885, held, and did Messrs. George M. Bain, Jr., and R. T. K. Bain propose to secure their debt at that conference, and how?

A. The conference was held at my house, and the idea was that if Dr. McDonald would put in enough money to save the bank that the Bains would secure their indebtedness by a conveyance of their real estate and

other property, such conveyance not to be recorded at the time. This idea was considered by Dr. McDonald during Monday night and was declined by him on Tuesday morning; he left town on the early train of that day.

Q. 7. Were you present at any latter conference than that at which Bain & Bro. made any further proposition to secure the bank, and how?

A. I was present at another conference on Tuesday night at the house of Mr. James G. Bain, in Portsmouth, at which there were also present, Col. W. H. Taylor, of the Marine Bank; Mr. Peters and Mr. Doyle, of the Citizens' Bank; Mr. Wilkinson, of the Bank of Commerce; Mr. Hardy, of the Farmers' Bank; Mr. Burruss, of Burruss, Son & Co.; Judge Watts, and, I think, Mr. Hatton, of the Bank of Portsmouth; C. W. Grandy, and Mr. Frank V. McDonald, and the Bains and others. There was a proposition made at that meeting by Bain & Bro. to secure the bank if these other parties would lend the bank such an amount of money as would enable it to stand; I think that was to be done also by conveyance of their property, real and personal, but the details of it I have forgotten. There may be some papers in existence that will reveal the details, if important.

Q. 8. Do you know whether these bankers and others made ready the funds to assist the Exchange National Bank?

A. I understood that the bankers did. The idea was that Mr. Grandy and Dr. McDonald should also contribute, but Dr. McDonald had left town and was on his way to the West, and his son could not hear from him by telegraph.

Q. 9. Was the Exchange National Bank to put up any securities for the assistance provided by the other bankers?

A. Yes.

Q. 10. Why did the plan fall through?

A. In the first place, Dr. McDonald was not heard from as to his contribution, and in the second place, Col. Walter Taylor, at a meeting held on Thursday morning, the 2d of April, asked me whether or not I could guarantee that the assistance would save the bank, and I told him no, that they would have to take the risk of that, that I could not guarantee any such thing; and it was found otherwise impracticable.

Before signing the above deposition the witness desires to add after the first sentence of his answer to cross-question No. 7, and as a part of said first sentence, the following words, to wit: "If I indicated to him any attitude at all."

(Signed) ALFRED P. THOM.

Subscribed and sworn to before me this 16th day of April, 1886.

(Signed) C. T. BARRY,
Special Master.

M. T. DILL, a witness produced by the plaintiff, being duly sworn, deposes as follows:

Q. 1. State your name, age, residence and occupation?

A. Matthew T. Dill is my name, 61 years old, Portsmouth, Va., contractor for railroads.

Q. 2. Were you the President during the years 1884 and 1885 of the Greenville Land and Lumber Company and the Meherrin Valley Railroad Company?

A. Yes, sir; I am not so sure about part of 1884, but from the time that the railroad was completed I was its president.

Q. 3. Was the lumber company the builder of the railroad, and was it done under your supervision?

A. Yes; it was built by the Greenville Land and Lumber Company, under my supervision?

Q. 4. Name the present termini of the Meherrin Valley Railroad, give the length of the road, and that it cost to build it?

A. Hicks' Ford, Va, and Margaretsville, N. C., are the termini of the road. It is about 17½ miles long, that is, the line proper. There is about 20 miles of track altogether, and it cost something over $105,000.

Q. 5. What is the present condition and what offer have you made to the trustees now in charge of it to purchase the whole road?

A. I don't know the exact condition of it now. It has two locomotives, without any rolling stock, that is loaned by the Seaboard and Roanoke Railroad Company. I made an offer of an option of $40,000 to purchase the road to Judge Watts, one of the trustees of the road.

Q. 6. Where were the Meherrin Valley Railroad bonds at the time of the failure of the Exchange National Bank?

A. Well, we had before that placed them in the hands of the treasurer, George R. Atkinson. At the time of the failure we presumed that they were still with him, until Mr. Thom told me that he had purchased them for the Exchange National Bank.

Q. 7. Did the railroad company or the lumber company ever authorize Mr. R. T. K. Bain or Bain & Bro. to issue and sell the $200,000 of Meherrin Valley Railroad bonds?

A. No, sir.

Q. 8. How did Bain & Bro. get the said bonds?

A. I don't know that. Atkinson, our treasurer, must have given them to that firm. I don't know how the firm got them from Atkinson.

Q. 9. Was Atkinson, the treasurer, ever authorized by you as president, or by the board of directors of the railroad company to deliver up those railroad bonds for sale?

A. No; not by either.

TUESDAY, April 6th.

Cross-examination of M. T. DILL.

Q. 1. Did I understand that you were the president of the Greenville Land and Lumber Company and also of the Meherrin Valley Railroad Company?

A. Yes, sir.

Q. 2. And of which company was Mr. Atkinson treasurer?

A. Of the Meherrin Valley Railroad Company.

Q. 3. And do I understand that the Meherrin Valley Railroad was built by the Greenville Land and Lumber Company?

A. Yes, sir.

Q. 4. Now please state whether or not the Greenville Land and Lumber Company did not obtain the funds for building that road from Bain & Bro.?

A. We borrowed money from Bain & Bro. to build the Meherrin Valley Railroad in part; I was building a telegraph line in which we were getting bonds and I sold some rebate bonds and put the funds in the bank: with the exception of that and the money I put in Bain & Bro. put in the balance.

Q. 5. Did you not obtain large sums of money from Bain & Bro. for the purpose of building the Meherrin Valley Railroad?

A. Yes, sir; I call it a pretty large amount; can give you the amounts if you want them.

Q. 6. Did not the Greenville Land and Lumber Company hold the bonds of the Meherrin Valley Railroad Company?

A. Yes, sir;—they were not delivered—the order was issued—it is a matter of record—there was an order by the directors of the Meherrin Valley Railroad Company to turn over to the Greenville Land and Lumber Company its entire issue of bonds and stock, after the completion of it, but they had never gotten the bonds in their possession. It is just the reverse of what I told you, I got the question mixed—they were just in the act of being turned over, and if you will ask me I will explain to you.

Q. 8. But according to your own account, an order was entered by the Meherrin Valley Railroad Company to turn over these bonds, and you were the president of both companies, were you not?

A. Yes, sir.

Q. 9. Please look at this paper now handed you (the Special Master is requested to file and identify it as part of this deposition, marked Exhibit Z) and state if it is not in your own handwriting, and state if you did not give it to Mr. Bain as a statement or list of assets at the time held by the Greenville Land and Lumber Company?

A. Yes, sir; this is my writing, but this is an early date—there is no date to this paper—I see there is only $25,000 Bankers and Merchants' bonds—this must have been early—this is my writing, but I cannot explain it, it must have been pretty early. The B. & M. is meant for Bankers and Merchants' bonds—this last—whilst we had $40,000. This is my writing, but I cannot tell you at what time.

Q. 10. Then you did give this paper to Mr. Bain?

A. No, I do not say positively that I did; I wrote it, but I do not know how it came there; I may have given it to him, I do not say that I did not nor did, but that I may have given it to him.

Q. 11. Mr. Bain has handed this paper to me, stating that it was given him by you as a list of the assets at the time of the Greenville Land and Lumber Company, do you deny that you gave this paper to Mr. Bain?

A. No, sir; I do not.

Q. 12. I find on this paper twenty miles of railroad of the Meherrin Val-

ley Railroad Company, and its franchises, and the three locomotives valued at $150,000—was that a correct valuation so far as you know and believe?

A. It is worth that to manage it in the way we intended; the road was built in the interest of the Greenville Land and Lumber Company to be used by it for its individual purposes together with what through trade we could get, and it was worth it.

Q. 13. And still you have stated on your direct examination, in answer to one of the questions put by the plaintiff's counsel. and as a sort of estimate of the value of this property, that you had made a proposition to the receiver of the Exchange National Bank to get an option from him for this property at $40,000, have you not?

A. Yes, sir; I did.

Q. 14. But I hardly suppose that the receiver accepted your proposition, did he?

A. No, sir; he did not. I want to explain about the assets so there will be no confliction; we always counted them in the assets, but they were not turned over; they had not had the bonds—the trustees had never signed them, and it was in statu quo—it was never intended to issue them except in $50,000 lots, just as fast as we could pay the interest—that was Mr. Bain's and Col. Bryant's and my own understanding; they were not to come to sale.

Q. 15. Please state the aggregate amount upon this list of the property mentioned?

A. $259,500.

Q. 16. Was it not always understood that all the property of the Greenville Land and Lumber Company should be security to Bain & Bro. for the large amount advanced by them, and was not that your purpose?

A. No, sir; it was just exactly as we carried it in and got discounts—we have receipts to show everything as collateral? all you want is the public entries on the books—he gave receipts for the property left there?

Q. 17. You have spoken of Mr. Atkinson's connection with this matter as treasurer of the Meherrin Valley Railroad Company, do you know that the bonds of the Meherrin Valley Railroad Company were first delivered at the banking house of Bain & Bro. in a box directed to the Greenville Land and Lumber Company?

A. Yes, sir; I think now, to the best of my knowledge, I was away, and Col. Bryant was away, and I ordered them sent to the care of Bain & Bro.

Q. 13. And how directed?

A. To the Greenville Land and Lumber Company, of course.

Q. 19. Were they afterwards taken to the banking house of Bain & Bro. and signed and executed by you as president and by the secretary?

A. Yes, sir.

Q. 20. And were they afterwards carried back to Bain & Bro.'s banking house?

A. No, sir; not by us; they were taken from our office by the treasurer Mr. Atkinson, to the best of my knowledge—where he took them I do not know, but it is my impression now—here is where I want to explain where they got these bonds. These bonds were to lay and were not to be executed until the Greenville Land and Lumber Company needed them, and the railroad able to clear a dividend; they were then going to be issued

in proportion to the amount of the ability to pay the dividend, but when the telegraph suit was brought there was a proposition made by Mr. Bain to me, the president, to have our bonds signed properly by the trustees, Mr. Whitehead and Mr. Jenkins, that in case he was made receiver of the Southern Telegraph Co. he could not have any interest in the bonds of the telegraph company. Mr. Bain got me to have these executed for the Railroad Co and he would give us up our collaterals, these telegraph bonds and simply hold them in trust for the company, to be our property, and he would take these railroad bonds as security for our loan, and we got them executed about 12 o'clock at night at the office of the Greenville Land and Lumber Company, and sent for Mr. Atkinson to take charge of them—Mr. Atkinson, our treasurer. After Bryant and the treasurer had signed them—the trustees had already signed—they were delivered to Mr. Atkinson in our office, and I think he took them to his house that night, and I never seen them afterwards. Mr Bain was not made receiver, and it was never carried out, and there was no change made whatever; that is the true status. Where Mr. Bain got them I could not tell you under any circumstances, but he must have gotten them from our treasurer. You can see the receipt drawn up at the instance of Mr. Bain changing our telegraph bonds, giving them up to us and taking railroad bonds as collateral for these large sums of money. Now I wish to explain further about the value of that road. I think that road to-day—I had a party to lease that road at $5,000 a year; that lease had an arrangement to remain and turn it over to the Seaboard Company if I had gotten it. I just want to tell the truth and want to explain what I was about. Of course I would have expected something not promised; I would have expected something if I got the road for $40,000; I told Mr. Robinson what I could lease it for for a term of years.

Q. 21. I understand you to admit, do you not, that the Meherrin Valley Railroad bonds were first delivered at Bain & Bro.'s office in a box directed to the Greenville Land and Lumber Company; is that not so?

A. To the best of my knowledge it is so; I had ordered them in the care of Bain & Bro., Portsmouth, Va., for the Greenville Land and Lumber Company from the American Bank Note Company.

Q. 22. Being so delivered, and being so received at Bain & Bro.'s, did you then consider these bonds as in possession and under the charge of Mr. Atkinson as treasurer of the Meherrin Valley Railroad Company?

A. No. sir; not at the time of delivery from New York to be delivered to the Greenville Land and Lumber Company; they were sent in care of Bain & Bro, to the best of my knowledge.

Q. 23. Were they not afterwards taken away from Bain & Bro. to be signed and executed for the purpose of being turned over to Bain & Bro. as security?

A. Under the qualification of my former statement they were; there was an arrangement made, as I tell you, to be turned over in lieu of our Southern Telegraph bonds, but it never was consummated.

Q. 24. Who holds these Meherrin Valley Railroad bonds at this time?

A. I do not know; I never saw them after that night.

Q. 25. Do you not know that Mr. Wm. H. Peters, the receiver of the Exchange National Bank, holds them?

A. I know that by hearsay; I have never seen them, I believe, to the best of my knowledge, but he never told me that he had them, but we have made a conveyance to the Norfolk Exchange National Bank; we have made an instrument of writing, but where the bonds are I cannot tell you; the conveyance is in the interest of the Exchange National Bank to two trustees, I think Judge Watts and Judge Garnett.

Q. 26. You recognize Mr. Peters, the receiver of the Exchange National Bank, as having control over the road, do you not, and able to dispose of the same, and was not your offer of purchase or of option made to him?

A. I presume it is the trustees; I do not know—that is, the trustees in the body of the paper that we signed—will have control over the road and not Mr. Peters; they for him, it may be.

Q. 27. Please state for whom Mr. Garnett and Mr. Watts are the trustees in connection with that matter?

A. For the Exchange National Bank. I think; I do not know whether the word receiver is mentioned or not; it is for the Exchange National Bank, I know.

Q. 28. Then, it is the bank or the receiver of the bank which is the beneficiary?

A. Yes, sir.

Re-direct examination:

Q. 1. Name the officers, directors and stockholders of the Greenville Land and Lumber Company:

A. In the organization, M. T. Dill, John H. Bryant, W. T. Dill, George R. Trant and T. L. Cleaton—admitted to record June 10th, 1882,—these were the incorporators. On June 22d, 1883, R. T. K. Bain was made a director on the resignation of George R. Trant, and that is the way it stands to-day, or up to the time of the resignation of Mr. Bain; he resigned about two days after the failure.

Q. 2. State what amount of money was contributed by the original incorporators and how much R. T. K. Bain agreed to contribute to the capital stock?

A. There was in money and in property that Bryant and I and my son but in $22,000 and some hundreds; our capital stock was to be $50,000; R. T. K. Bain agreed to contribute $25,000; he was to have half.

Q. 3. Did R T. K. Bain pay for and receive his stock in that company?

A. He received his stock—two shares less than one half—I was to have control; he was not quite in possession of one half; I told him I could not give him control of the company, and consequently I kept back three or four shares, delivering a little less than half to him; the stock book will tell. We never got a credit for it, that was the unfortunate part of the thing, he charged us up with all the matter. His stock, in other words, is not paid for at all unless he discharges some of the notes and gives a credit for it. I want to explain how Mr. Bain wanted to do this; he proposed that I take notes and make them seconds for our

$22,000; after paying Bain & Bro. their money then we were to get ours; his plan was to make the capital as we went along.

Q. 4. Now, name the officers, directors and stockholders of the Meherrin Valley Railroad Company?

A. This is the way the matter stands: M. T. Dill, president; John H. Bryant, secretary and treasurer; W. T. Dill, D. S. Cherry and George R. Trant, who was put back again, directors; I think that is right.

Q. 5. Who were the directors before the failure of Bain & Bro.?

A. M. T. Dill, John H. Bryant, W. T. Dill, D. S. Cherry and R. T. K. Bain.

Q. 6. Who was to hold all the stock of the Meherrin Valley Railroad Company?

A. The Greenville Land and Lumber Company was to have the entire issue of stock and bonds of that road, but it was never issued, as I said, we were not ready, we never intended to issue those bonds; I have the stock book but it has never been issued.

Q. 7. And do you say distinctly that the Meherrin Valley Railroad Company bonds, $200,000 face value, were to be exchanged for $140,000 Southern Telegraph Company bonds, with Bain & Bro. at the time that R. T. K. Bain was a candidate for the receivership of the Southern Telegrap Company?

A. Yes, sir; at his own request.

Q. 8. When R. T. K. Bain failed to receive the appointment of receiver of said telegraph company what then did you understand was the situation of the railroad company's bonds?

A. Why, of course they belonged to the Greenville Land and Lumber Company.

Q. 9. But did R. T. K. Bain keep or afterwards take possession of both the $200,000 of railroad bonds and the $140,000 Southern Telegraph bonds and sell the same to the Exchange National Bank?

A. I have that only from hearsay.

Q. 10. You have said that you thought the Meherrin Valley Railroad could have been leased by you for $5,000 per annum; is that what you would consider its fair rental value now; could you get more for it?

A. I do not think I could get any more, and do not know whether I could get that now. As I stated that road was built in the interest not of carrying trade exactly, but for the improvement of that valley.

Further this deponent saith not.

(Signed) M. T. DILL.

It is agreed between counsel that the witness sign the stenographer's notes.

MONDAY, March 29th, 188.

Present: Charles T. Barry, Special Master; Judge T. S. Garnett, counsel for the plaintiff; and Mr. Richard Walke, of counsel for the trustees.

CHAS. T. PHILLIPS, a witness produced by the plaintiff, being duly sworn, deposed and said:

Q. 1. State your name, age, residence and occupation?

A. Charles T. Phillips, age 48, Portsmouth, Va., clerk of the courts, Portsmouth, Va.

Q. 2. Were you the clerk of the Hustings Court of Portsmouth on the 6th day of April, 1885?

A. Yes, sir.

Q. 3. Relate the circumstances attending your admission to record on that day of the deed of Bain & Bro. to Messrs. Old, Jenkins and Griffin, dated April 6th, 1885.

A. Sometime during the latter part of the day of that date, I think, as near as I can remember, about 7 o'clock, just before I shut up the office, between 6 and 7 o'clock, I think it was, Mr. Old, or some one for him, I think Mr. Old though, asked me to keep my office open a little longer than usual on that day, that he had a very important document to go to record and he wished to avoid any excitement or crowd, which was the reason he did not bring it earlier in the day. I did so, and somewhere between 8:30 and 9 o'clock, I think, Mr. Old brought the deed mentioned.

Q. 4. State what was done with said deed; was there any discussion about it and at what hour of the night did you admit it to record?

A. The deed was admitted to record when presented, between 8:30 and 9—I did not notice the hour; the discussion simply with a number of gentlemen present, and they simply talked about the terms of the deed after it had been admitted to record; the deed was recorded immediately.

Q. 6. Did you give the usual clerk's certificate or receipt for it; if so, at what hour did you give it?

A. We put the usual clerk's certificate on the deed after it was recorded; did not give him any receipt for it; it is not customary to do so. We put the same certificate upon that as on all other deeds.

Q. 6. At what hour did you complete the recordation of the deed on the deed book and close your office?

A. I could not tell you, I think somewhere about 12 o'clock as well as I can remember.

And further than this deponent saith not.

C. T. PHILLIPS

$22,000; after paying Bain & Bro. their money then we were to get ours; his plan was to make the capital as we went along.

Q. 4. Now, name the officers, directors and stockholders of the Meherrin Valley Railroad Company?

A. This is the way the matter stands: M. T. Dill, president; John H. Bryant, secretary and treasurer; W. T. Dill, D. S. Cherry and George R. Trant, who was put back again, directors; I think that is right.

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Further this deponent saith not.

(Signed) M. T. DILL.

It is agreed between counsel that the witness sign the stenographer's notes.

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Q. 6. At what hour did you complete the recordation of the deed on the deed book and close your office?

A. I could not tell you, I think somewhere about 12 o'clock as well as I can remember.

And further than this deponent saith not.

C. T. PHILLIPS

RICHARD H. WRIGHT, a witness produced by the plaintiff, being duly sworn, deposed and said:

Q. 1. What is your age, residence and occupation?

A. Age 31 years; residence Norfolk, 158 Granby street; receiving teller in the Norfolk National Bank.

Q. 2. How long were you in the service of the Exchange National Bank and in what position?

A. I was twelve years in the bank and at the time of its close I was book-keeper.

Q. 3. State the number, as near as you can, of individual ledger accounts of the Exchange National Bank?

A. I think between 1,700 and 1,800.

Q. 4. On what proportion of these was interest paid by the bank to its depositors?

A. As well as I can judge, about two-thirds of them.

Q. 5. What rate of interest was allowed to depositors?

A. Five and six per cent.; towards the latter part five, under certain conditions.

Q. 6. Were any accounts allowed more than that?

A. Yes, sir; 7 per cent.

Q. 7. What was the rate of discount charged by the bank to its ordinary customers?

A. Nine per cent.

Q. 8. What was the rate of discount charged Bain & Bro. on their paper?

A. As far as I know, 6 per cent.

Q. 9. Were you the messenger sent by the receiver with certain stocks to Mr. George M. Bain Jr., for the purpose of having him endorse and assign the said stocks; if so, state what occurred on that occasion?

A. I was there on the 22d of July, 1885, with some stocks of the Norfolk and Ouray Mining Company, and I asked Mr. Bain if he would transfer this stock to the receiver. He stated that the stock was not the property of the bank, but his own individual property, and refused to assign.

Q. 10. State the number of shares he so refused to assign and whether you had other shares of the other individual members of the firm in the same situation as the said Norfolk and Ouray mining stock?

A. I had 648 shares of George M. Bain's, which he refused to assign, and had 646 of R. T. K. Bain's, and 646 of James G. Bain's, and 100 shares of George M. Bain, trustee.

Further this deponent saith not.

[Signed] R. H. WRIGHT.

HENRY S. HERMAN, a witness for the plaintiff, being duly sworn, deposed and said:

Q. 1. What is your name, age, residence and occupation?

A. Henry S. Herman; age 26; residence Norfolk; clerk in the Citizens' Bank.

Q. 2. How long were you in the service of the Exchange National Bank and in what position; from what date and up to what date?

A. I was in their service about three and a half years, and I was considered discount and collection clerk; my duties embraced other things, but these were the principal; I was there about three and a half years up to the time of the failure.

Q. 3. Take the paper now handed you (marked exhibit X, filed with the deposition of H. S. Herman), and state whether the same is in your handwriting; whether you made up the said statement from the books of the Exchange National Bank, and say what the said statement truly represents?

A. Yes, it is my handwriting; I made the statement out; it represents the statement of the condition of Bain & Bro.'s account as shown by the books of the Exchange National Bank on the 31st day, or the end of each month for a number of years prior to the failure of the bank, excluding discounts. The accounts represented in this statement are the debit or credit balance on the daily balance book of the bank to the credit of Bain & Bro.'s account or overdraft; it also represents due bills in the cash; it extends from 1874 to 1885. I would state that there were some months in which I could not find any memorandum of any cash items in the cash against Bain & Bro. This account also represents what was due by Bain & Bro. to the Exchange National Bank from bills which had fallen due and had not been taken up on the day on which they were due and charged to Bain & Bros. on the book "State of the bank," styled "pro forma" account in this exhibit X. The bills were sent over and pro forma made out, and when the bills came due they were not taken up, but charged to this account, which showed Bain & Bro. to be indebted to the Exchange National Bank that amount, and that amount would accumulate from time to time, and they would send over a check to take it up.

Q. 4. Now take the said statement and say whether or not the indebtedness of Bain & Bro. appears as steadily increasing to the bank, and give the figures at the end, say of each of the last six or seven years of their dealings with the bank?

A. According to this account, from 1878 up to the time of the failure of the bank, it showed the account to have increased according to this, which is independent of notes or bills. then discounted, as follows, for instance:

On December 31st, 1878, it showed the account to have debit balance	$ 42,214 62
On Dec. 31st, 1879, it showed the account to be debit	125,096 78
On Dec. 31st, 1880, it showed the account to be debit	144,372 55
On Dec. 31st, 1881, it showed the account to be debit	57,011 52
On Dec. 31st, 1882, it showed the account to be debit	85,462 97

But during that year, on the 31st of August, they were indebted to the Exchange National Bank $297,453.94; I state that to show that the account was increasing, notwithstanding the fact that it was lower on the 31st day of December.

On December 31, 1883, account showed debit.....$191,050 89
On December 31, 1884, account showed debit..... 368,217 13

Q. 5. Did you have charge of the discount books of the Exchange National Bank; if so, say about what was the usual amount of notes and rediscounts the bank was carrying for Bain & Bro. in addition to the large indebtedness you have just named?

A. I had charge of the discount tickler and tickled all the paper of the Exchange National Bank, but owing to the fact of the Exchange Bank not having a discount ledger it would be a difficult matter to form any idea of their indebtedness so far as notes and bills were concerned unless they were taken off especially to reach that end. I would state that I prepared for Judge Garnett, at his request, a list of the notes and bills showing the amount due by them to the Exchange Bank at the time the statements were called for by the Comptroller of the Currency for about a year prior to the failure of the bank, which will show that account. This statement shows fully all the paper that Bain & Bro. owed, because it was proved by the accounts of the bank. After examining the said statements I find from the one dated December 20th, 1884, that the discounts for Bain & Bro. then amounted to about $800,000.

Q. 6. Did the paper of Bain & Bro.—I mean their own paper made and endorsed simply by them—pass through the regular discount books or not?

A. It was not entered on the regular discount book, but was tickled on the discount tickler; it was entered with inland bills; all their paper was entered with all inland bills.

Q. 7. What was the meaning of the term inland bills at the bank?

A. Paper that was due outside of the city of Norfolk, which necessarily had to be sent away for collection, and some record of it had to be retained in the bank, simply a copy of the paper itself.

Q. 8. Where was Bain & Bro.'s paper always made payable, and was it sent away for collection with inland bills?

A. I could not say where the paper that Bain & Bro. discounted at the Exchange National Bank was payable for the reason that it was kept in Portsmouth by them, we only having the pro formas, and the pro formas not stating at what bank the paper was payable; it might have been payable at the Bank of Portsmouth or some other bank; of course I do not know.

Q. 9. Is the paper now shown you (marked Exhibit Y in your deposition) what was known at the Exchange National Bank as a pro forma?

A. Yes, sir.

Q 10. Now take the thirteen notes of Bain & Bro., each for twenty-five thousand dollars, aggregating three hundred and twenty-five thousand dollars, now held by the plaintiff in this cause, and say where each of the said notes is made payable, and are these the kind of notes you say were carried in inland bills, and were they sent away for collection?

A. Each of the said notes is made payable at the National Park Bank of

New York; they were not sent away for collection for the simple reason that they were not due at the time of the failure of the bank. I could not say whether they would have been sent away or not. These are the kind of notes carried in inland bills, but not the only bills, as they had a great deal of rediscounted paper, which was represented in the schedule which I made out some time ago. I do not think that these notes were generally sent away for collection.

Q. 11. Then this slip of paper called a pro forma was kept at the bank in place of the real note of Bain & Bro.—is that so?

A. Yes, sir.

Q. 12. How were all notes except Bain & Bro.'s numbered at the said bank on your discount tickler?

A. They were numbered from one up to an even number of thousands, and when we reached that number we would turn around and go back rather than carry through such large numbers.

Q. 13. Did all notes other than Bain & Bro.'s have full numbers; illustrate this in your answer?

A. It was a rare thing for a note discounted in the regular way for other than Bain & Bro. to have a half number, but I have known instances of the kind since I have been in the bank.

Q. 14. What was the rule and practice in numbering Bain & Brothers notes?

A. I do not know for the reason that I never numbered any of them; for the matter of reference to these notes, to find when they were discounted, they were numbered by halves, quarters and three-quarters, in regular order, with the rest of the inland bills.

Cross-examination by Richard Walke, Esq.:

Q. 1. Please look at the account filed by you with your examination-in-chief as Exhibit X, and state how low at any one time in the year of 1883 the indebtedness of Bain & Bro. to the Exchange National Bank was, according to that account?

A. On June 30th, it was $10,928.45, exclusive of loans and discounts which had not matured at that date.

Q. 2. Now state how low it was, according to that account, at any one time in 1884?

A. On February 29th, $38,105.82, exclusive of notes and bills which had not matured at that date.

Re-direct examination:

Q. 1. Were these reductions accomplished by applying the proceeds of new discounts or not?

A. As a general thing I think it was.

SATURDAY, April 10th, 1886.

H. S. Herman, recalled by the plaintiff, deposed and said:

Q. 1. Mr. J. H. Toomer, in answer to the first question on his cross examination, has stated that it is not correct to say that Bain & Bro.'s own paper, endorsed by them, was kept in Portsmouth by them, the Exchange National Bank having only the pro formas, and has explained why you did not know that. Just state, if you please, what you know as to the mode of discounting and keeping Bain & Bro.'s own paper and the mode of discounting and keeping the rediscounted paper of Bain & Bro. at the Exchange National Bank?

A. That is all stated in my testimony, to the best of my knowledge and belief, at that time; I stated that all the paper, so far as I knew, was kept by Bain & Bro. in Portsmouth, we only holding the pro formas; if we held the paper then why should the paper not be represented in the discounts instead of the pro formas.

Q. 2. If Bain & Bro.'s own paper, endorsed by them, was kept at the Exchange National Bank, what evidence had you of it?

A. Bain & Bro.'s own paper may have been kept at the Exchange National Bank, as Mr. Toomer has stated in his testimony, but as I had no way of knowing that it was kept there, not seeing the paper at all, their rediscounted paper, as I have stated, must have been kept in Portsmouth, for the reason that the day of the failure, or a day or two before the failure of the bank, the rediscounted paper was sent over by Bain & Brother, and I was requested to pin the paper itself to the pro formas which represented it in the discounts.

Q. 3. Were these bills receivable, so sent over by Bain & Bro.. the same rediscounted paper of Bain & Bro., which were on hand when the bank closed?

A. Yes, sir.

Cross-examination:

X-Q. 1. I would ask you to read Mr. Toomer's answer to the first cross-question propounded to him, and then state if you, as one of the officers of the Exchange National Bank, had charge of the envelope referred to by him in which the notes of Bain & Brother, as well as of other papers, were kept?

A. I might have had charge of it in this way, that if, as Mr. Toomer states in his testimony, the envelope was kept by the general ledger bookkeeper in the drawer in his desk, before closing the bank at night I always went to that drawer and took out a lot of papers, but had nothing directly to do with them, and put them in a pocket book which I put in the vault every night before closing the bank; I do not know that that was kept in there, but I presume so.

X-Q. 2. Can you say whether or not Bain & Bro.'s notes were kept in that envelope?

A. With the information that I have gained since giving my testimony

I should say that they were kept among those papers. But that does not apply to the rediscounted paper.

And further this deponent saith not.

H S. HERMAN.

THURSDAY, March 30th, 1886.

Present: Charles T. Barry, Special Master: Judge T. S. Garnett, counsel for plaintiff, and Richard Walke of counsel for the trustees.

JAMES H. TOOMER, a witness produced by the plaintiff, testified as follow, after being duly sworn:

Q. 1. State your name, age, residence, occupation.

A. James H. Toomer, age 51 years, Portsmouth, Virginia,, Cashier of the Merchants and Farmers Bank.

Q. 2. State how long you were connected with the Exchange National Bank of Norfolk, and in what capacity?

A. I was there altogether about thirteen years and a half; I first went there as simple clerk, then as general bookkeeper, and for the last three or four years was assistant cashier; do not remember the exact time, but the books will show when I was appointed assistant cashier.

Q. 3. The minute book of the bank is here presented to you, please examine the same. and say if you first qualified as director of the bank on the 13th of January, 1876?

A. According to the minutes of this book, that is so.

Q. 4. When did you cease to be a director, and when were you elected assistant cashier?

A. According to the minutes of the book, I was not re-elected Janaary 11th, 1881, and elected assistant cashier on January 13th, 1881.

Q. 5. Were you actively and daily employed, at said bank, and what were your peculiar duties?

A. I was actively and daily employed, but it is a rather difficult thing to say what my peculiar duties were; as a general thing, it was more the supervision of internal affairs of the bank, supplementing the work of bookkeepers and clerks, seeing that the work as a general thing—the machinery of the bank went on properly and smoothly.

Q. 6. How often did the board of directors meet in that said time?

A. To my knowledge the board of directors met twice a year usually to declare a dividend and only at such other times as they might be called together for some special purpose, as far as my knowledge goes.

Q. 7. What was the usual dividend at such meetings?

A. Usually five per cent on the capital stock

Q. 8. Did the board of directors manage the business of discounting paper at said bank; if not how was the same conducted?

A. In my opinion the board of directors did not; the discounts were usually made by Mr. Bain, chiefly, and occasionally by Mr. Whitehead. I suppose, as I know there were occasions when Mr. Bain would consult Mr. Whitehead, that there was consultation between the two in regards to the discounts.

Q 9. Were you a member of the exchange committee of the bank and what duty did you perform as such?

A. I was appointed a member of that committee but I never felt that that gave me any authority over the discount of the bank.

Q. 10. Did you assert any such authority as a member of that committee?

A. Only on very rare occasions, such for instance as when the amounts were very small, or where the party was such that I knew the president and cashier would allow the discount, and even in these cases I always carried them to Mr. Bain or Mr. Whitehead, if they were accessible.

Q. 11. Look at section 13 of the by-laws of the Exchange National Bank, minute book page 11, and say how the exchange committee therein provided was composed?

A. The book will show how they were composed at different times; they were elected. At the time I do not remember, the books here will show whether I was appointed every year or not. When I was appointed it was the president, cashier and assistant cashier; that is not it exactly; I think when I was director I was a member of that exchange committee.

Q. 12. What do these by-laws provide that the exchange committee shoud be?

A. The by-laws says it shall consist of the president, cashier and one director.

Q. 13. Now look at page 395 of the minute book under date of Jan. 12th, 1881, and say who composed the exchange committee from that time until the close of business of the bank?

A. On January 12th, 1881, the minutes show that the president, vice-president. cashier and assistant cashier were appointed exchange committee On Jan. 13th, 1883, the minutes show that the old exchange committee consisting of the president, cashier and assistant cashier was re-appointed. On Jan. 9th, 1884, the minutes show that the exchange committee consisting of the president, cashier and assistant cashier was re-appointed On Jan. 15th, 1885, the minutes show that the exchange committee consisting of the president, cashier and assistant cashier was re-appointed for the ensuing twelve months.

Q. 14. Section 13 of the by-laws of the bank provides that the exchange committee shall have power to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange, and shall at each regular meeting of the board, make a report of the bills and notes discounted and purchased by them since their last previous report. State whether such reports were made to the board of directors by the exchange committee.

A. To my knowldge, there was no formal report made.

Q. 15. Who usually calculated the discounts on the notes of Bain & Bro. offered by them for discount?

A. They were usually calculated by me.

Q. 16. At what rate of discount were Bain & Bro.'s notes usually discounted?

A. I remember for the last year or two, some at six and some at five per cent.

Q. 17. What was the rate of discount usually charged to all other ordinary customers of the bank?

A. It ran from six to nine per cent.

Q. 18. What was the prevailing rate to them?

A. The prevailing rate was nine per cent.

Q. 19. About how many depositors' accounts were borne on the books of the Exchange National Bank?

A. I am unable to say; I suppose it would run from 1400 to 2000.

Q. 20. What was the rate of interest paid to depositors?

A. The rates varied very much. That is a hard question to answer because the manner of allowing interest was different with different accounts, according to the state of the account, and the kind of account, and the circumstances connected with it; some man with a large balance would simply get interest on so many thousand dollars right though the year; other men got interest on daily balances. Sometimes just a limited sum would be allowed for the interest after examining closely into the account—what it was worth.

Q. 21. Name the highest rate allowed any depositor.

A. A great many years ago when I first went there, I think some were getting eight per cent.; the usual rate of interest considered in the bank was five per cent. but a great many were allowed six; old depositors whose accounts justified it, and in rare cases seven per cent. was allowed, but as I have understood this seven per cent. the additional amount was considered more in the light of a commission for the influence of the parties receiving it.

Q. 22. Were you familiar with the books and papers of the bank?

A. As a general thing, I was.

Q. 23. Did you have charge of the securities lodged with the bank, or access to them at all times?

A. I had access to them.

Q. 24. Did you keep the run approximately or accurately of the account of Bain & Bro. with the Exchange National Bank?

A. I cannot say I did; that word approximately—I certainly did not have it accurately by any means, and only had a general idea of the accounts of Bain & Bro., and a general and loose idea, I may say, of their accounts; as they were managed entirely by the cashier I gave myself no concern about them at all.

Q. 25. Can you state, approximately, about what amount of indebtedness on all accounts, that is to say notes and bills, inland bills, suspended paper and due bills in both the paying and receiving teller's cash, &c., Bain & Bro. usually carried at said bank?

A. I cannot.

Q. 26. Can you not give it approximately?

A. No; I can only say this, that my idea was that Bain & Bro. had, perhaps, a half million or so dollars, but I could not say that I have any definite idea at all in my mind as to what their liabilities were; as I said, it was something managed entirely by Mr. Bain, I had no call to concern myself with it at all; no occasion for the tellers to ask me whether they should pay a check or not; no occasion for the clerks to see me about it, and therefore I did not trouble myself about Bain & Bro.'s matters, and my only idea was a general one. The nearest I can answer the question is that perhaps a year ago, or so, and a very short time before the bank

failed, if I had been required to give my opinion at that time I should have said six hundred thousand dollars, but even at that, I would not have wanted anybody to take action upon my opinion without verifying it; it was only a general idea I had.

Q. 27. Did you ascertain when the bank was about to close what Bain & Brother owed the bank?

A. I do not think I did, that information was already given in the report of Mr. Keyser, in March, 1885. I heard so many different accounts that I have it all mixed as to what his report was; I remember this, that at or about the time of Mr. Keyser's report to the Comtroller about the middle of March, there were about $625,000 of Bain & Bro.'s notes there besides the re-discounts, and I have no idea what this amounted to, except perhaps, since the failure of the bank, seeing the reports and noticing on the book.

Q. 28. What securities prior to March 31st, 1885, did the bank have as collateral for the general indebtedness of Bain & Bro.?

A. I never troubled myself about knowing what securities the bank had for Bain & Bro.; I cannot say of my own knowledge what they were.

Q. 29. Do you know of any?

A. Not of my own knowledge; there was an envelope in the box marked "Bain & Bro"—collateral box—which was marked as they usually are, but what was in it, I do not think I ever looked to see; my impression is (but it's merely an impression) that it was Seaboard Cotton Compress stock, but I do not remember to have seen it, or opened the envelope.

Q. 30. When were the Meherrin Valley Railroad bonds and the Southern Telegraph bonds delivered by Bain & Bro. to the bank?

A. I do not know.

Q. 31. Were you at the bank on the 31st of March, 1885?

A. I was.

Q. 32. Did Bain & Bro. deliver the Southern Telegraph bonds at the bank that day?

A. I do not know.

Q. 33. What then was the nature of your office as assistant cashier?

A. When I was general bookkeeper I endeavored to make myself familiar with all the work of the bank, and to make myself useful in every capacity; to assist not only the cashier, but everybody else, and after I was appointed assistant cashier I do not know of any duties which I performed except having authority to sign checks more than I did before; I assisted the cashier whenever he called on me to perform any duty.

Q. 34. State what were the salaries by the bank to its president, vice-president, cashier and assistant cashier during the last few years of its existence.

A. The cashier was paid ten thousand dollars per annum, the president, I think, six thousand, and the assistant cashier thirty-six hundred; I do not think that the vice-president received any salary.

Cross-examined by Richard Walke, Esq.

Q. 1. Mr. Herman, one of the plaintiff's witnesses, testified on yesterday

that Bain & Bro.'s paper—I mean their own paper, endorsed by them,—was kept in Portsmouth by them, the Exchange Bank having only the pro formas; please state whether that is correct or not?

A. It is not correct. If I understand the question, the notes of Bain & Bro. made by them and endorsed by them, were kept in the Exchange National Bank. I will explain why Mr. Herman did not know that. All of the paper made payable out of Norfolk was either sent off to our agent to be collected at maturity or else held in the bank until such time as the cashier saw fit to send it off, a pro forma being made to represent that paper. These notes of Bain & Bro., as well as notes of other parties of long date, were kept in an envelope and endorsed "inland bills, not sent off." I think that was the endorsement, but that is the idea of it. The general bookkeeper was the discount clerk so far as putting the discounts on the books, and this paper just mentioned was put in this envelope and the pro formas simply turned over to Mr. Herman, who kept charge of the paper, so that he had charge only of the paper which matured in the bank in Norfolk and of the pro formas which represented paper and matured elsewhere.

Q. 2. Then Bain & Bro.'s paper was held by the bank just as the paper of any other parties would be?

A. Yes, sir.

Q. 3. And I understand that their re-discounted paper payable elsewhere was sent off for collection?

A. It was turned back to the cashier; the cashier usually delivered them to me to be delivered to the bookkeeper to be entered on the discount book, and after entering and pro formas made, they being usually payable at Bain & Bro.'s they were then turned back to the cashier to be delivered to Bain & Bro. for collection.

Q. 4. And why was re-discounted paper delivered to Bain & Bro. for collection?

A. It was usually payable at Bain & Bro.'s.

Q. 5. Have you any knowledge as turning over of Meherrin Valley Railroad bonds and Southern Telegraph bonds to the Exchange National Bank?

A. I have not; I first saw those bonds a few days before the failure of the bank, but I understood that they had been in posseesion of the bank, but of my knowledge I do not know it; I would say this, that Mr. Whitehead and Mr. Bain both, to the best of my knowledge and belief, sometimes held the collaterals of the bank in a different place from the box where they were usually kept and to which I had access. I would say further, that in the inner vault, that is the safe in the vault, I remember a roll which I understood was there for collateral for something, but what I do not know; that was some time before the bank closed. That roll was kept there because it was too large, I suppose, to go in this box; there is a larger place in the inner safe and that is the reason that the roll was kept there I suppose. Whether they were Southern Telegraph bonds I do not know; I do not remember what they were.

Q. 7. What knowledge have you in regard to the delivery to Bain & Bro. on March 31st, 1885, of the items constituting the $570,000 of their indebtedness?

A. I suppose it is that date, I do not remember. Mr. Bain, the cashier,

came to me one day and gave me a memorandum of certain entries which he wanted put on the books, which entries were to relieve Bain & Bro. of certain of their indebtedness and to charge up on the books certain securities. I hesitated to make that entry and remarked to Mr. Bain that I thought this was a very important matter and I preferred some—not that I doubted his authority, but I thought the matter was of so much dignity that it required something more than the say so of the cashier to the assistant cashier. Afterwards he came to me and told me that the president and board of directors had decided this matter; I saw the president and saw the attorney for the bank, who told me it was all right; I then made the entries on the books, which entries were to charge up $300,000 of the compress stock, $200,000 of the Meherrin Valley Railroad stock and $140,000 Southern Telegraph bonds at fifty cents on the dollar, making $570,000; then a certain amount of these notes of Bain & Bro. were to be taken in and the balance credited on their account. I cannot say that I know anything about the delivery; my impression is that I delivered the notes to the cashier for him to deliver them to Bain & Bro. In regard to the entries which were made, on referring to the books I find the pro forma account of

Bain & Bro. credited with	$133,500 00
A call loan of Bain & Bro. with interest	89,660 90
Nine notes	225,000 00
Due bill in the paying teller's cash	113,045 21
And the balance of the $570,000, amounting	8,393 89
was credited to Bain & Bro 's account as a deposit.	
	$570,000 00

Q. 8. In answer to a question propounded to Mr. H. D. Bulkley, one of the plaintiff's witnesses, calling upon him to state what proportion of the assets of the Exchange National Bank was evidenced by paper of Bain & Bro. both as makers and endorsers and by paper of firm or corporation in which they were either directly or indirectly interested, Mr. Bulkley has enumerated, besides the single name paper of Bain & Bro. and the paper of others endorsed by Bain & Bro. and the note of James G. Bain, the following items, to which I wish to call your attention:

Four notes of the Norfolk and Ouray Mining Company, aggregating	$ 98,169 46
Notes of the Richmond Cedar Works, aggregating	96,000 00
Notes o Wm. H. Smith & Son, aggregating	117,000 00
Notes of the Washington Improvement Company	35,000 00
	$346,169 46

Please state whether the firm of Bain & Bro. or any member of the firm of Bain & Bro. were liable on any of those notes just referred to, namely, the Norfolk and Ouray Mining Company, the Richmond Cedar Works, Wm. H. Smith & Son and the Washington Improvement Company?

(NOTE BY COUNSEL FOR PLAINTIFF—H. D. Bulkley, the expert accountant, finished his deposition on the 26th instant, and counsel for the trustees declined to cross-examine the witness; the Master is requested to note

that the said H. D. Bulkley departed for his residence in New York and cannot now be recalled.)

A. In regard to the notes of the Norfolk and Ouray Mining Company, there was one note, the amount of which I do not remember, on which I think the cashier was one of several endorsers; the other notes I do not think Bain & Bro. or any member of the firm was liable on. In regard to the notes of the Richmond Cedar Works, some of them the firm was not liable for so far as I know, but it may be that some of those notes were re-discounted for Bain & Bro. The notes of Wm. H. Smith & Son I do not think that Bain & Bro. or any member of the firm were liable, nor were they liable on the note of the Washington Improvement Company.

(Counsel for plaintiff here admits that neither Bain & Bro. nor any member of that firm was liable, either as maker or endorser, on the $35,000 paper of the Washington Improvement Company, or on the $117,000 of paper of Wm. H. Smith & Son, or on the $96,000 of the Richmond Cedar Works, and that as to the $98,169.46 of notes of the Norfolk and Ouray Mining Company George M. Bain, Jr., was endorser on one of said notes, amounting to about $28,000 of principal, which said note was secured by deed of trust upon and has been paid by a sale of the property, and that the direct or indirect interest of Bain & Bro., alluded to above, was as stockholders of the several corporations above mentioned, and that Thomas Alexander Bain, son of George M. Bain, Jr., partner of the firm of Wm. H. Smith.)

Redirect examination:

Q. 1. You say that the rediscounted paper endorsed by Bain & Bro. was turned over to Bain & Bro. for collection because payable usually at their banking house in Portsmouth; when such paper was so collected by Bain & Bro. from the makers of the paper were the proceeds usually charged up against Bain & Bro.'s account at the bank?

A. When the paper became due it was charged up that same day to Bain & Bro.

Q. 2. And such collections usually increased the balance against Bain & Bro. at the bank, did they?

A. They did.

Q. 3. Was the list of names of makers of the re-discounted paper of Bain & Bro. the same in many instances for successive years constantly appearing in such discounts?

A. I noticed occasionally that some of this paper appeared to be a renewal of other paper, but I had no knowledge that such was the fact.

Q. 4. Where were the notes of Bain & Bro.—their own paper—usually made payable?

A. At the Park Bank, New York.

Q. 5. Were they sent there for collection?

A. Not to my knowledge.

Q. 6. How were such notes usually numbered on the pro forma attached to them and on the discount tickler?

A. There were two sets of numbers for discounted paper in the bank—one set for paper payable in Norfolk, the other set for paper payable elsewhere. This paper of Bain & Bro. was usually numbered with the series of numbers payable elsewhere. They were all whole numbers, except certain ones; those that were put on the discount book were numbered consecutively and then whenever a discount was put directly on the books any other way it was put with a number, a whole and fraction, so as to show easily the date upon which it was discounted.

Q. 7. Was the paper of Bain & Bro. usually numbered—all of it—with these fractional numbers, quarters, halves and three-quarters?

A. It was.

And further this deponent saith not.

(Signed) JAS. H. TOOMER.

WEDNESDAY, March 31st, 1886.

Present: Chas. T. Barry, Special Master; Judge Garnett, counsel for plaintiff; Richard Walke, Esq., of counsel for trustees, and W. W. Old, trustee.

WILLIAM H. PETERS, the plaintiff, being duly sworn, deposed and said:

Q. 1. What is your name, age, residence and occupation?

A. William H. Peters, 69 years of age; residence, Portsmouth; occupied as receiver of the Exchange National Bank of Norfolk.

Q. 2. Are you the plaintiff in this cause?

A. I am.

Q. 3. When did you assume control of the affairs of the Exchange National Bank of Norfolk as receiver?

A. I was appointed on the 9th of April, and qualified and took charge on the 11th of April, 1885, relieving Mr. B. U. Keyser, who was agent of the Comptroller of the Currency, who had had charge of the bank from the 2d of April up to that date.

Q. 4. State what you ascertain to be the present indebtedness of Bain & Bro. to the Exchange National Bank, giving them credit for any collections made by you since the 2d of April, 1885, as also for any compromise with others made by you since that date under orders of this court?

A. Bain & Bro.'s obligations consist of their—

Notes unendorsed and unsecured		$ 325,000 00
Notes of others endorsed by them		593,251 99
Cash tickets		211 00
Stock assessment of the firm		58,200 00
Geo. M. Bain, Jr		23,200 00
Thos. A. Bain		9,100 00
James G. Bain		9,100 00
R. T. K. Bain, stock assessment		9,100 00
Receipts of W. H. C. Ellis		1,394 90
Their notes endorsed by bank and discounted in New York		50,000 00
Ascertained deficiency in guarantee of Southern Telegraph bonds		41,300 00
		$1,198,857 89
Less this amount paid me to date on note endorsed by them	$54,314 30	
And this amount lost in compromise settlements of notes endorsed by them	63,101 80	117,416 10
		$1,081,441 79

—to which there must be added the loss that will be sustained on their guarantee, which undoubtedly must be very large. That is the total amount due exclusive of interest. I here file a written statement showing the details of this indebtedness of Bain & Bro.

(The Master is requested to file this with the papers in the cause and

not copy the same in the deposition—marked exhibit Bain & Bro.'s Debt.)

Q. 5. State the amount of indebtedness of Geo. M. Bain, Jr., to the Exchange National Bank, individually, both as maker and endorser, principal and surety, or jointly with any other?

A. I find first an—

Overdraft of Geo. M. Bain, Jr., of		$ 5,823 09
Cash ticket of Geo. M. Bain. Jr		37 00
Unpaid assessment on 232 shares bank stock in the name of Geo. M. Bain, Jr		23,200 00
And one note, signed jointly by John B. Whitehead and Geo. M. Bain, Jr	$31,200 00	
On which has been paid me by dividend Baker Salvage Company	1,000 00	
		30,200 00
The above note is secured by the pledge of 839 shares Preferred Stock Norfolk & Ouray Mining Company and 100 shares Baker Savage Company Stock		
One other note, also signed jointly by John B. Whitehead and Geo. M. Bain, unsecured, for		11,500 00
Overdraft of John B. Whitehead and Geo. M. Bain, Jr., secured by collateral	$60,569 47	
On which has been paid and credit given	12,270 35	
		48,299 12
The $12,270.35 being the proceeds of sale of $2,800 Southwest Improvement Company bonds—one hundred and fifty shares Southwest Improvement Company stock, and 158 shares Albemarle Swamp Land Company stock, sold by me, with the approval of the Comptroller of the Currency, and under an order of the honorable court, these stocks and bonds, together with other securities now held by me, were pledged as security for the overdraft of $60,-569.47		
Cash tickets of John B. Whitehead and Geo. M. Bain, Jr		1,346 51
Unpaid assessment of 100 shares bank stock, standing in the name of Whitehead & Bain		10,000 00
		$133,405 72

Call loan note, $79,550.00, dated September 15th, 1884, which is a renewal of a call loan note dated January 10th, 1881, for $75,444. With this call loan there were originally pledged as collateral 2,200 shares of Norfolk and Western Railroad stock, and $8,000 Norfolk and Western Railroad debenture bonds. These latter bonds are in my possession, but the 2,200 shares of Norfolk and Western Railroad stock were, with other securities, pledged with Alex. Brown & Sons as a security for a note of the Exchange National Bank, dated February 8, 1883, for $150,000.00, on that day discounted by them, and on which there is

now claimed by them to be due $100,000. This call loan of $79,550.00 has been credited with $479.20, interest paid me on the $8,000 bonds	79,070 80
I would state in connection with this transaction that noticing a marked activity in the market price of this stock, I requested Alex. Brown & Sons, last fall, to sell the 2,200 shares, which they did, and the sum of $68,602.50 was realized from the sale, which said sum of $68,602.50 is now held by Alex. Brown & Sons, pending a suit brought by me, as receiver, against them	
One note of the Norfolk and Ouray Mining Co., endorsed by Geo. M. Bain, Jr., and seven others, for $28,598.73, since paid to me by foreclosure of the deed of the said mining company, securing the same	
One note of G. A. G. Scott, endorsed by Geo. M. Bain, for $140, on which there has been paid me, $115.00	25 00
One note of S. S. Nottingham, endorsed by Geo. M. Bain, Jr., $3,000, on which there has been paid $175	2,825 00
There is one other item, an individual note of Jas. G. Bain, which was carried as a cash item, endorsed by George M. Bain, Jr	3,000 00
The aggregate indebtedness of Geo. M. Bain, Jr., after allowing the above credit, being	$215,326 52

In no instance is any interest included.

Q. 6. Explain whether you have included in both statements, firm and individual, the item of Geo. M. Bain's, Jr., stock assessment on 232 shares of Exchange National Bank stock?

A. Yes; I have included it, and have given them in the statement of indebtedness of George M. Bain in answer to the question; of course the assessment can be made to but one account; this item should be charged but once.

Q. 7. State what efforts you have made to realize upon the stocks and bonds delivered to the bank under the agreement of March 31st, 1885; whether you have sold any of the same under orders of this court, and what the deficiency on Bain & Bro's guarantee is, already ascertained or likely to be?

A. I have already stated the deficiency in the guarantee of the Southern Telegraph Company's bonds which were sold by me, under an order of the court, and with the approval of the Comptroller, $41,300. I obtained an order of court under instructions from the Comptroller of the Currency to sell the Seaboard Cotton Compress Company's property, and in pursuance of that authority and order, I advertised for proposals for the purchase of the same in prominent newspapers in the principal seaport cities North and South. Proposals were to be received and opened for the purchase of said property on the 27th of March, 1886. There were seven proposals submitted, only one of which included the property as an entirety, and that proposal was a conditional one, and the sum named was $150,000. Proposals for pieces or parcels of the property were received, and measuring the value of the whole by the price offered for these parcels,

I should say $150,000 would be the amount reached. On this property, if sold at $150,000, that would be a loss under that guarantee of $210,000. I would state, however, that this offer of $150,000 is not the value of the property, in my opinion, by any means, and that I have so reported to the Comptroller. In regard to the Meherrin Valley Railroad bonds, I would state that this property is in the hands of trustees, and under my instruction, they have endeavored to make sale of the property. My first limit to them being $100,000; subsequently I reduced this limit to $75,000; they report to me that up to the present moment they have been unable to find a purchaser at $75,000. Assuming this to be the price at which it may be sold, there will be a loss of the difference between $200,000 and $75,000, which would be $125,000. I would add there that I myself have written to the president of roads running in the neighborhood of this road, and asked for offers for its purchase without any reply.

Q. 8. Estimating the face value of the stock of the Seaboard Cotton Compress Company to be $500,000 of which stock you hold the 2,970 shares of Bain & Bro., and the 1,930 shares taken in compromise from Reynolds Bros. under the order of this court, say whether you have filed a petition to this court to be allowed to sell the entire property of the Seaboard Cotton Compress Company, and what, in your opinion, is its value?

A. I believe the property to be worth $300,000. I have filed petition to sell the property, as previously stated.

Cross-examination.

Q. 1. Please look at the advertisement now shown you, over your signature in regard to the sale of the property of the Seaboard Compress Company, Norfolk, Va., contained in the Norfolk Landmark, newspaper of the city of Norfolk, of March 19th, 1886, and state if this advertisement was prepared by you and inserted by you in that paper?

A. Yes, sir; I identify the advertisement; it was prepared by me and published in the Landmark at my instance.

(The Special Master is requested to file this advertisement, marking and filing it as an Exhibit with the witness's answer to this question.)

Q. 2. Do you claim the sole and entire control over $200,000 of Meherrin Valley Railroad bonds and a perfect right to sell those bonds of the railroad in question?

A. The road is in the hands of trustees who, I suppose, may be controlled by me; I have no reason to doubt that I have a perfect right to sell the road, and all its bonds.

Q. 3. In giving the indebtedness of Bain & Bro. on your examination in chief you have included all their indebtedness on the paper of others endorsed by them and their liabilities on the assessment on their stock in the Exchange National Bank, including Thomas A. Bain, have you not?

A. I think I have.

Q. 4. And in giving George M. Bain, Jr.'s, indebtedness you have included all the indebtedness of his, direct or indirect, whether as sole maker or joint maker or endorser, have you not?

A. I have to the best of my knowladge and belief.

Q. 5. Mention all the securities pledged for the overdraft of George M. Bain, Jr., and John B. Whitehead of $60,569.47, referred to in your answer to question number 5 of your direct examination?

A. $2,800 Southwest Improvement Company bonds, 100 shares Post Combination Sewing Machine Company's stock, 150 Southwest Improvement Company's stock, 50 shares Roanoke Land and Improvement Company's stock, 18 shares Norfolk Knitting Factory preferred stock, 158 shares Albemarle Swamp Land Company's stock, 104 shares Powhatan Land, Lumber and Construction Company's stock, 190 shares Atlantic and Danville Railroad stock, 10 shares Baker Salvage Company's stock, 40 shares Luray Cave and Hotel Company's stock. 39 shares Dismal Swamp Canal Company's stock, 75 shares Upshur Guano Company's stock.

Redirect examination:

Q. 1. You say in your advertisement of the sale of the Seaboard Cotton Compress Company's property as follows: "Its books, which are open for examination, show earnings of handsome dividends on its capital stock of $500,000;" explain when those earnings appear to have been made on the books and whether stock dividends thereof were declared to the former incorporators?

A. These earnings were in one or two years—I cannot say positively how many—previous to the cotton season 1884-1885; I cannot answer as to the stock dividends without reference to the company's books.

Further this deponent saith not.

WM. H. PETERS.

Adjourned until 10 A. M. April 1st.

TUESDAY, April 6th.

Present: Charles T. Barry, Special Master; Judge Garnett, counsel for the plaintiff, and Richard Walke, Esq., of counsel for the trustees.

W. W. OLD, a witness for the trustees, being duly sworn, deposed and said:

Q. 1. What is your name, occupation, age and place of residence?

A. W. W. Old; 45 years of age; attorney at law, a member of the firm of Walke & Old; residence Norfolk.

Q. 2. State when and under what circumstances you were called in as counsel by Bain & Bro. in connection with their deed of assignment?

A. I was called in as counsel of Messrs. Bain & Bro. the 2d of April, 1885; I left the city of Norfolk on that morning early and went to Princess Anne Courthouse to attend the Circuit Court of that county, which was then in session, and while there attending to my business I received a note from Mr. Robert Bain by special messenger calling me to the city at once. I repaired to the city and reached here about 5:30 or 6 o'clock in the evening, and was then engaged as counsel in the crisis which was then pending.

Q. 3. Explain the circumstances under which the deed of assignment of Bain & Bro. was made, and in that connection explain first the two deeds made by Wallace & Son?

A. The first intimation that I had of any trouble or difficulty of any kind with the Exchange National Bank or with the affairs of Bain & Bro. was through the note that I received the 2d of April, 1885, just referred to. Upon reaching the residence of Mr. Robert Bain on the evening of the 2d I found that he was in great trouble and was in need of advice as to his course and legal rights in the premises. He stated to me on that evening something of the difficulties then surrounding his firm and after talking with him for a short while I found that he was not in the condition then to accomplish anything. Among other difficulties which he was then facing was one of securing a large indebtedness from Wallace Son to Bain & Bro. the amount of which was stated to be several hundred thousand dollars and which was stated to be one of the main causes of the inability of Bain & Bro. to meet their obligations. I found at the house of Mr. Robert Bain Mr. Geo. T. Wallace and Mr. John G. Wallace, and I also found representatives of the Richmond Cedar Works assembled there. Another difficulty which was presented in the beginning of these negotiations was the consequent embarrassment to the Richmond Cedar Works, of which Mr. Bain had been one of the managing officers, and the result which must follow, unless something was done to protect it in connection with indebtedness to the Exchange National Bank. These were the first matters to which I directed my attention. I ascertained that the Richmond Cedar Works owed the Exchange National Bank about $143,000 which was evidenced by notes amounting to about $96,000 discounted by the Exchange National Bank without the endorsement of Bain & Bro. and about $46,000 which had been discounted by the Exchange Natiional Bank upon

the endorsement of Bain & Bro I also learned that a great deal of property which was then standing in the name of Wallace & Son or of the individual members of the concern, consisted of swamp land and other property purchased for the profitable use of this swamp land all which were intended to be used in connection with the Richmond Cedar Works. The Richmond Cedar Works were engaged in the manufacture of wood ware principaliy juniper or white cedar, and these lands used in connection with these work, were considered essential to their future prosperity. To have divorced them from the Cedar Works and allowed them to go into the hands of others would have been virtually a means of stopping the successful operations of the works. These matters were discussed and it was re presented that if these lands and the property which had been purchased to be used in connection with them were conveyed to the Richmond Cedar Works that company would then be in a condition to meet all of its obligations including those which was due to the Exchange National Bank amounting, as above stated, to ubout $143,000. The Richmond Cedar Works was a depositor of Bain & Bro. to the extent of $31,885.71 and it was stated by the president, Mr. Parrish, and the other members of the company who were interested in its prosperity that they could afford to purchase these swamp lands and this personal property at a fair market price if a draft on Bain & Bro. for the sum of $31,885.71 could be used in paying for them. After discussing the matter fully the deed was made to the Richmond Cedar Works as found in the record, under my advice, and as the best thing to be done for the purpose of keeping the Richmond Cedar Works in a solvent condition and enabling it to meet its obligations including those to the Exchange National Bank The question of securing the indebtedness of Wallace & Son to Bain & Bro. next presented itself and to tnat I bent all my powers and energies for the next few succeeeding hours. Messrs. Wallace & Son acknowledged a large indebtedness to Bain & Bro. and that they did not have property enough to secure it. They expressed not only a willingness but a desire as a matter of justice to Bain & Bro. to turn over to them all their assets and it was only a question of the best practical mode of accomplishing that object. I got from them a list of what they owned outside of what had been conveyed to the Richmond Cedar Works, or what was then in process of conveyance to the Richmond Cedar Works (the conveyance to the Richmond Cedar Works was determined upon as to all of its terms and conditions on the 3rd of April, and the papers were then in process of preparation, but were not finally prepared and executed until the evening of the 4th, if I remember corrrectly) and went over with them the different plans that were suggested as to the best means of accomplishing that purpose. Their express desire was to secure to Messrs. Bain & Bro. the indebtedness due to them at their banking house in Portsmouth, which amount was stated to be in round numbers over $300,000, but they desired, and thought it was absolutely incumbent upon them, not only as a matter of justice to their laborers, but for prudential reasons, to secure their laborers first. After considering the matter, instead of making a deed of trust as was at first proposed, and considering the large amount of indebtedness to Bain & Bro., in order to avoid complications with the trustees in the deed of assignment which Bain & Bro. had then determined

to make, and to save expense, it was determined that they should make a conveyance of their property to Bain & Bro., so that it might pass as assets under the deed of assignment which Bain & Bro. might thereafter make, and the property upon the list was put down at a valuation fixed by Messrs. Wallace & Son, and without any question on the part of Mr. Bain. When we had proceeded thus far, the question of the rights of Mrs. Geo. T. Wallace presented itself, and before approaching her, I stated that I thought it was proper that she should be advised fully of her rights before signing any deed whereby she conveyed her contingent right of dower. Mrs. George T. Wallace is the second wife of that gentleman, and in comparison with his age, is a young woman. Mrs. Wallace was sent for, not only for the purpose of enabling me to advise her in regard to this matter, but also for the purpose of executing the deed to the Richmond Cedar Works, and when I met her I told her what was in contemplation, and what her rights were; that she could refuse to sign these deeds, or if she signed them of her own free will and accord she had a right to impose conditions in the way of a settlement before doing so, which would inure to her advantage. She asked me to do what was right in the premises and said that she was perfectly willing to sign the deeds, but thought, considering Mr. Wallace's age and health, and the condition in which she had always lived and moved, that a settlement should be made upon her. I then, to the best of my ability and judgment, devised a plan by which Mrs. Wallace's rights could be thus protected, and went to work to perfect that. This delayed the completion of the settlement of the Wallace matter, which was begun, in fact, on Saturday, April 4th, but was not completed, that is, the settlements were not made and deeds signed, until April 6th. In the meantime, there was great pressure brought to bear upon Messrs. Bain & Bro. by depositors in the city of Portsmouth who were largely interested in their affairs to have them make an assignment. There were rumors floating in the air of one kind and another which only caused the excitement to increase as the hours sped on. Committees were calling upon them and much of our time which ought to have been devoted to the preparation of papers and the arrangement of details was taken up in meeting them. Mr. R. T. K Bain from the beginning, and his brothers also, as I understood, and was fully verified afterward, determined to make a full and complete surrender of everything they had in the world for the benefit of their creditors, and the only question with them was the best means of doing it so that the creditors secured under the deed might receive the greatest benefit, and the manner in which these creditors could be secured; there was never any doubt or hesitation on their part as to this. Their plan was—and the only plan that was discussed—to secure the depositors of their banking house in the city of Portsmouth, who were represented to amount to at least $900,000, and after taking into consideration what had already been passed to the Exchange National Bank in the few days preceeding the closing of that bank, in money and other securities, to so dispose of their property that their depositors in Portsmouth should get at least an equal amount with what the Exchange National Bank had received and would receive under the deed for the amounts which it was

determined that it should also be secured. That the laborers and employees of Bain & Bro., whose claims amounted to a small sum comparatively, should be first secured, there was no question, and it was also ascertained that certain persons who were depositors at the banking house in Portsmouth had given notes to Bain & Bro., which notes had been transferred to the Exchange National Bank, and in that way they would be deprived of their right of off-set to which they were entitled unless some provision was made for them in the deed, and for that reason the preferences that are mentioned in the deed were provided and the preference also in favor of the laborers of the Wallaces was therein embodied, in accordance with the understanding hereinbefore stated, as a matter of good faith, and which was, in fact, a part of the consideration of the Wallace deed. Upon this plan as soon as it was decided upon, I, as counsel for these gentlemen, bent all my energies and all my powers to carry it out, as any faithful attorney would do. The deed was commenced to be written on Sunday night, the 5th of April, and was completed on Monday morning, after working throughout the whole night, and was executed during the day on Monday, by all the parties thereto except two of the trustees therein named, and it was held by me until late on Monday night, the 6th of April, in order that the Wallace deed and the settlement upon Mrs. Wallace might be completed and delivered. After this was done I took the deed of trust to the Clerks' Office in Portsmouth and had it recorded Having heard in the meantime that there was an attempt to prevent my having it recorded by getting an injunction, on the ground that if an injunction was obtained before it was recorded and the Court got possession of the property to be conveyed thereby that a creditor obtaining the injunction and using the process of the Court for the purpose of obtaining possession of the property before the recordation of the deed, would get priority; and if anybody knows me in this community he will know that as counsel in this case, when I heard of such an attempt, I did all in my power to prevent it.

Q. 4. State now what was the consideration of the deed from Wallace & Son to the Richmond Cedar Works and how that consideration was paid or secured to be paid?

A. The consideration was $55,000, of which $31,885.71 was paid by an order of the Richmond Cedar works in favor of Wallace & Son on Bain & Bro., and the balance of the purchase money, amounting to $23,114.29, was paid by several notes. As the deed was first drawn there were four notes: Two of $5,778.57; the other two for $5,778.58, payable two, three, four and five years respectively after date, and secured by vendor's lien upon the property to be conveyed. Afterwards the notes were each divided up as shown by an entry at the foot of the deed in eleven notes of $500 each and one of $278.57 or $278.58 as the case might be, which notes were passed to Bain & Bro. and then to the hands of the trustees under their deed. The draft for $31,885.71 was also endorsed by Wallace & Son to Bain & Bro. and the draft was turned over; it was understood that that draft should be charged up against the Richmond Cedar Works and credited as part of this purchase money to Wallace & Son on their indebtedness to Bain & Bro.; that was not done in fact before the trustees took charge of the banking house of Bain & Bro., because no one was allowed

to go in that banking house—it was closed; but after the trustees took charge this draft was entered as a transaction which had occurred before the making of the deed to the trustees, and so stands now. In other words, it is a complete offset to any claim of the Richmond Cedar Works for the amount of their deposit at Bain & Bro.'s. I have understood it to be a draft—a sight draft.

Q. 5. Please state when the assignment of Bain & Bro. was signed, acknowledged and delivered?

A. It was on the 6th of April, 1885; the deed was completed early in the morning of the 6th and signed by Mr. R. T. K. Bain and his wife that morning about 9 or 10 o'clock, I should judge; it was carried to Mr Geo. Bain and after it was read over to him, explained to him, and discussed with him, and also to Mr. James G. Bain, it was executed by them, and their wives sometime before four o'clock, but inasmuch as after the discussion with Mr. Geo. Biain an interlineation was made in the deed which materially affected it, Mr. Cassell, the Notary, returned to Mr. R. T. K. Bain and took again, under my advice, the acknowledgment of himself and wife. The deed was then in my possession until about ten o'clock—Mr. Phillips says a little before ten, I think about ten—when the Wallace deed had been executed and the deed of trust was then delivered to me, formally, and I recorded it.

Q. 6. When did you take the deed of trust to the Clerks Office of the Hustings Court of the city of Portsmouth to be recorded?

A. I think it was about ten o'clock. Mr. Phillips as I have before stated says it was a little before that time, but my recollection is that I looked at my watch, and I think I am very clear about this, if there is anything in it, and found that it was ten o'clock when I left Mr. Bain's house. I had before that time seen Mr. Phillips and asked him to keep his office open that night as I desired to record an important paper and was not then prepared to do so for reasons which I did not choose to state to him and I also told him or sent him a message. I do not remember which that if he found that he had to leave his office to be at home and I would send for him. When I started with the deed I had Mr. Atkinson with me; for the purpose of going to bring Mr. Phillips to the office, but I met Mr. Marshall on the street and he said that Mr. Phillips had just gone to his office to open it for me and Mr. Atkinson then went home and I went to the office and found Mr. Phillips there.

Q. 7. State whether or not when you recorded the deed of trust from Bain & Brother, the deed of Wallace & Son had then been executed and delivered to you and was in your possession.

A. It had; I did not record the deed of trust until after the Wallace deed was delivered and that is the reason why I did not record it earlier in the evening.

Q. 8. State why the deed from Wallace & Son was not recorded that night.

A. The Wallace deed conveys property exclusively in the county of Norfolk and not in Portsmouth and the Office of the Clerk of the county of Norfolk was not open that night or I might have recorded that also, though I did not consider that of as great importance as recording the deed of trust by reason of the rumor of an attempt to get an injunction

of which I have just spoken and which induced me to bend all my energies and powers to prevent any complication of that kind in a matter which I had undertaken.

Q. 9. State what or about what was Wallace & Sons' indebtedness to Bain & Brother.

A. I understand at that time that it was over $300,000, exclusive of the note which the Exchange National Bank held, and the books and papers have more than verified that statement.

Q. 10. Please state about what is the actual value of the Wallace property conveyed by their deed to Bain & Brother as nearly as you can now estimate it.

A. I do not think that we can realize $100,000 from it by perhaps $10,000 or $15,000, though I am loth to make statements here that will depreciate estimates of property in our possession as Trustees; we are going to get all we can for it.

Q. 11. Please state about what, as near as you can estimate it, is the value of the property conveyed in the Bain deed of assignment including the Wallace property.

A. I think that the property now may be estimated at from $400,000 to $500,000; this property has depreciated since this suit has been pending and I consider that the loss to the Trust Estate in our hand by reason of the pendency of this litigation has been at least $50,000, and may reach $100,000.

(The latter clause of the witness's answer is objected to by Counsel for the plaintiff on the ground that it is a voluntary assertion and in no wise called for by the question propounded.)

Q. 11. State what occurred between you and Mr. Thom, then Counsel of the Exchange National Bank, in any conversation between you and him prior to Bain & Brothers' assignment in reference to said assignment.

A. I want to be exact and accurate as I can. On the morning of April 3d, 1885, Mr. A. P. Thom called to see me, and after learning that I was counsel for Messrs. Bain & Bro. in their difficulties then surrounding them, asked me if they proposed to make an assignment for the benefit of their creditors, and I told him I supposed that would be the result; that I could see no other end to their difficulties, but that I had not then had time to advise fully with them upon the subject, having only seen Mr. Robert Bain a short time the evening before. He then informed me of the assignment of March 31, 1885, and also stated that Mr. Robert Bain had also promised him that in case Bain & Bro. should find it necessary to make an assignment they would not prefer against the Exchange National Bank, and he desired me to bring the matter before Mr. Robert Bain and induce him to observe the sacredness of this promise. In this interview with Mr. Thom, as well as in subsequent interviews with him, this promise was treated as involving a question of honor and not any legal obligation. I told Mr. Thom very frankly that I wished to guide the Messrs. Bain properly, and would mention the matter to them and hear what they had to say about it, and would let him hear from me. He rather persisted that I should use my influence with Mr. Robert Bain, especially, to urge

him to keep this promise, stating that he had no hold on him, or words to that effect. On the morning of the 4th, soon after I reached my office, Mr. Thom again called to see me to learn the intentions of Messrs. Bain & Bro., and I told him that I had mentioned to Mr. Robert Bain what he had said the day before, and that he (Mr. Robert Bain) viewed the matter of the sacredness of the promise in a different light from that in which Mr. Thom viewed it, and after talking over and discussing the matter somewhat with Mr. Thom, fearing lest he (Mr. Thom) might think that I was not acting candidly with him, or rather not wishing him to be under any false impression as to my position, I told him that I did not wish him to be under the impression that I was to occupy the position of inducing or urging Messrs. Bain & Bro. to observe this promise; that as I viewed it I was satisfied that Messrs. Bain & Bro. would be compelled to make an assignment, but of the terms and conditions thereof I was not then advised, as other matters preliminary thereto had occupied my whole attention; that in my opinion the keeping of this promise was a question of morality, and not a legal question, and that while I should advise Messrs. Bain & Bro. fully of their legal rights, to the best of my ability, I did not think it proper for me to go beyond that and solve also questions which savored of morality, and I stated to him that I had no doubt but that it was no legal obstruction to their making any preference to bona fide creditors in such manner as they might determine, and Mr. Thom not only did not dissent from this position, but agreed with me and admitted that he had no hold on Messrs. Bain & Bro by reason of the said promise to prevent their making a deed and ignoring entirely the Exchange National Bank, and he argued with me that they should not do so, however, for prudential reasons. After talking the matter over with Mr. Thom in this way I suggested to him that he could not rely upon me as an advocate in the matter, and that he had better see Mr. Robert Bain himself if he had any further communication to make him. He asked me if I had any objection to his seeing Mr. Bain, and I said none whatever, and you are perfectly free to see him, and so far from objecting to it personally I would rather you should do so. That was the extent of our interview or communications on the subject.

Q. 12. State whether Mr. Thom ever claimed in the conversations alluded to by you that the promise referred to was in any way a legal or binding promise, and state how the matter was treated, not only by you, but by him in the course of those conversations?

A. He never did in his interviews with me claim that it was a legal or binding promise; that is, such a promise as he could by any proceeding enforce; on the contrary, he admitted that he had no hold on Messrs. Bain & Bro., and his whole object in interviewing me was to induce me to use my influence in getting Mr. Bain to carry out a promise which he admitted he could not enforce. I think that is what Mr. Thom states his attitude to be in those interviews; I do not understand it differently and I never heard it claimed to the contrary until recently.

(The above question and answer are objected to by counsel for the plaintiff on the ground that the meaning and effect of the promise of R. T. K. Bain, mentioned by the witness, and whether the same is a legal

and binding promise, is a matter for the construction and judicial determination of this court, and the opinion of the witness himself, or of Mr. Thom, the other witness, is not relevant testimony.)

Q. 13 Please state whether or not Mr. Thom ever told you in those conversations alluded to that he told Mr. Robert Bain that he would not accept the assignment of March 31, 1885, unless he made the promise alluded to?

A. He did not.

Q. 14. Please state what was done by you and the other trustees in the preparation of the inventory of the property conveyed under the deed of assignment, and how and from what source prepared?

A. That is a right hard question to answer. I have done so much work about it that I hardly know the beginning or the end. From the time we took charge of the assets of Bain & Bro. we did all in our power to ascertain and catalogue of what those assets consisted. They were of a varied quality, considerable quantity and scattered about over three or four counties and the two cities in this vicinity, and there was no accurate account of them at the banking house which would give us all the information that we desired. We knew that there was a great deal of real estate but the deeds for most of it could not be found in the office. We at once went to work to ascertain the personal property, because the deeds for the real estate were of record, and we did not feel so much concern about that. This we had listed and appraised as we found it, and in some cases we got outside parties to make appraisements because it was impossible for the trustees to give their individual attention to all these matters. These lists we had in the office when this suit was brought, and when it was required that we should file an inventory in this suit we went to work to arrange it as best we could to meet the requirements of this court. We had the records examined in the different clerks' offices in Portsmouth and adjoining counties; looked at the assessment lists, and such other sources as were accessible; found out the real estate to which Bain & Bro. were entitled as best we could, got the original deeds whenever we could find them and in many instances found that Bain & Bro. had not received deeds for property which they had bought and paid for. We had deeds prepared so that proper conveyances thereof might be made. From all these sources, the lists we had in the office, and the deeds, we made up the best inventory, after considerable labor and attention on my part, that was possible; if anything has been omitted from it it has been entirely unintentional and can be easily corrected. I would here state that we knew when we filed it that it was not absolutely perfect, but it was as near perfect as we could then get it, and I can only say this, that nothing, not a dollar's nor a penny's worth of any property has come into our possession that has not been accounted for where we have disposed of it, and where we have not disposed of it the property is still in our possession.

Q. 15. I find on page 5 of the inventory filed by the Trustees a lists of stocks, bonds and securities; please look at that list and state nearly as you can, the value of the different items mentioned thereon.

A. 45 shares Norfolk and Portsmouth Warehouse Co., par value 50, worth nothing.

122	shares	Franklin Bank par value.....	$100	worth	nothing
36	"	Portsmouth Insurance Co., par value.....	25	"	$2,150.00
144	"	Norfolk & Ocean View R. R. Co. par value	50	"	7,200.00
79¼	"	Albemarle Swamp Land Co. par value....	100	"	1,977.00
10	"	Norfolk College for Young Ladies, par val..	50	"	50.00
5	Bonds	Ocean House Hotel, par value.....	100	"	250 00
1	share	International Cotton Exchange, par value..	100	"	nothing
1	"	Seaboard & R. R. Co. par value.....	100	"	$ 150.00
39	shares	Dismal Swamp Canal Co. par value.....	100	"	975.00
246	"	Greenville L. & L. Co. par value.....	100	"	nothing
35	"	Western Branch Draw Bridge Co. par value	50	"	1,750.00

of these we have only 28 shares in our possession, 7 shares we have never been able to get hold of though Mr. Bain is entitled to them—they have been lost or mislaid.

10 shares Portsmouth Gas Company, par value $50 worth $500, and a lot of Virginia and West Virginia interest certificates and fractional currency bonds amounting to $2,687.06. I think we have sold and accounted for them at $278.00.

625 shares Chesapeake & Idaho Gold & Silver Mining Company, par value 50, worth nothing.

6114 shares Norfolk & Ouray Mining Company as appears by the books of the Company, all of the script not being in our hands par value $100 worth nothing.

In regard to this Norfolk & Ouray Mining Company stock I desire to say that we hold the script for 3602 shares only of this stock, not including 125 shares in the name of C. L. Upshur which is held as collateral, but in making up the inventory I put down the amount which they told me at a meeting of the Norfolk & Ouray Mining Company held in June or July, 1885, that Messrs. Bain & Brother or the members of that firm were entitled to, 6114, according to the books of the Company, and that Mr. Geo. M. Bain as Trustee, was entitled to 450 shares, and that the Trustees were entitled to vote on that number, and I put the number on the lists from the representations made to me at that meeting, not knowing anything about the balance of the script, having never seen it; but I considered it worthless then, and absolutely worthless now, and put it there more as an indication of their investments than for any other purpose that I know of; I wanted to give them credit for everything they had bought. In looking at the Inventory I find 268 shares of Southern Telegraph Company's Stock of the par value of 100 dollars included therein; this Stock, if I understand it, is properly put upon said Inventory. I find the script for that Stock in the Greenville Land & Lumber Co. papers, with a power of Attorney of J. A. Bryant, Secretary, to transfer it, and I understand that it was held as collateral.

Q. 16. I find on page 84 of the Inventory the item of $89,378.20 as amount due for merchandise, &c., on open account, stated there, however, to be subject to setoffs, and including expenditures on farms charged against them. Please state in general terms the actual state of that account; whether or not the setoffs are heavy.

A. We found when we took charge of the books that were kept by Mr. Atkinson. and which contained accounts of sales of bricks, lime, guano and such things, a large number of accounts, and also accounts showing expenditures for outlay on several farms that were carried on by Messrs. Bain & Bro. at the time of their failure. In making up our inventory we deemed it proper to take these accounts and list them, and report them exactly as we found them on the books wherever they had not been closed. A great many persons who owed claims and were charged with them on these books kept by Mr. Atkinson had deposited with Bain & Bro., and the accounts had not been closed between them simply because checks had not passed. Of course these were legal offsets, and the trustees in settling up the trust subject allowed them in every instance. There were few accounts on these books that were not subject to some offset of that kind; some of the parties had claims outside of their deposit accounts against Bain & Bro., and in every instance where we were satisfied of the genuineness of the claim we have allowed them. It was proper that this should be done because the parties were entitled to it, and our plan of settlement has been to avoid all litigation, delay, expense that was possible. We also found about, in round numbers, $20,000 or $25,000 charged for the outlay on the various farms which we took charge of, inasmuch as the crops were then in the ground, or about to be put there, and worked for the benefit of the trust. These are put down here as amounts due Bain & Bro., whereas it was really their own indebtedness. I cannot state the exact amount we have allowed as offsets, but I think it is between $12.000 and $25,000, at least, taking the expenditures off; we have allowed at least that; that is in addition to the expenditures on farm.

Q. 17. Please state whether or not any guano came into the possession of the trustees?

A. The only guano that came into our possession was that which was on storage at the Seaboard Cotton Compress Company. When we first took charge of the trust subject we were very much in need of guano for carrying on our farms, and I understood that Mr. Bain or the Messrs. Bain had some on storage at the Seaboard Cotton Compress Company. We attempted to get it, and I found that it was there under a claim, not only for storage, but also for the satisfaction of a quantity of guano which the Messrs. Bain were said to have used which belonged to the Compress Company. I offered to buy this guano and pay for it its market value and let the storage company hold the money. That was denied me. Afterwards, upon being informed that this guano was there and some other articles, in a negotiation with Mr. Peters, receiver, all of the Peruvian guano that was on storage there was yielded to the receiver on account of his claim for storage and also of his rights to hold the same to replace the guano which had been used by Messrs. Bain belonging to the Compress Company, so that not a bag of it has ever come into the possession of the trustees that I know of. There were some odds and ends of Mapes' Formula guano and some Flamingo and other odds and ends not Peruvian guano, which were turned over to us by Mr. Peters as managing the Seaboard Cotton Compress Company, which were sold for $250, and accounted for, and for which we paid him the storage, amounting to $133,93. as will appear by our accounts filed in this cause March 11th, 1886. The price

of these odds and ends and Mapes' Formula guano is also accounted for in the same report. I mention this particularly because these articles do not appear on our inventory, and they did not so appear because I understood that the claim of storage would absorb them.

Q. 18. Mr. H. D. Bulkley, in his answer to question 27 of his deposition, has given a list of persons found by him to be indebted to Bain & Bro. on account of the purchase of guano received from the ship Mt. Edgecombe; please look at that list and state what the true amount was due by those persons after allowing them offsets to which they were entitled?

A. Of the amounts stated to be due by various persons for guano, in answer to that question the following have been settled entirely by offsets:

Thomas Owens	$ 707 25
John T. Griffin	402 85
L. D. Bunting	632 94

And the amount that is mentioned there as due by W. G. and J. F. Maupin—Mr. Bulkley not having stated the amount in his answer—but whatever was due has been settled by offsets, and there is a balance due them after paying all claims due Bain & Bro. on the books.

The following have been settled by offsets in part:

Cotton & Owens, offsets	60 95
J. E. Ames, offset	117 00
W. H. Bunting, offset	270 00
American Fertilizing Company, offset	39 90
John Stewart	34 94

In the settlement of other matters with Mr. Stewart this offset was allowed, although it was properly chargeable against this account; it was as broad as long. That leaves on the said amounts—

J. W. Maynard . (which has been paid the trustees.)	314 51
John Stewart	214 06
which has been paid.	
Cotton & Owens (of which $150 has been paid)	363 34
P. Rodman	1,585 09
which has been paid.	
L. D. Ames	1,855 52

The amount of his bill is reported and shown by the books, $1,974.39, but there was an error of $117.87, which was allowed on settlement, so that he paid us $1,855.52.

J. E. Ames	428 73
which has been paid us.	
W. H. Bunting	930 78
which has been paid.	
American Fertilizing Company	597 11
which has not been paid.	
J. C. Taylor (of which he has paid $200.)	680 00
Hines & Mansfield	320 06

which has not been paid, and which I understand is disputed, and for which I suppose we will have to bring suit.

Q. 19. I find on page 85 of the inventory an item of $111,131.93 as "Amount of overdrafts on books as per list enclosed in envelope No. 2, most of which are subject to setoffs;" please state in general terms what is the condition of that account of overdrafts and the character and amount of the setoffs?

A. As before stated in regard to the item of $89,378.20 in one of the preceding questions, when we made up this Inventory, we took the books and reported all the overdrafts that we found thereon, (except those of Wallace & Son, which were not extended) knowing that they were subject to very large setoffs. This amount of $111,131.93 is composed principally of an overdraft against John E. West for about $52,000; overdraft of Greenville Land & Lumber Company for about $23,000; overdraft of Armstrong, Son & Co,, for, I think, $20,000. I am giving amounts from my recollection—and an overdraft of Etheridge & Brooks for about $6,000, and one of Dutton for about $9,000. When we came to examine the matter, we found there were large claims as before stated, for offsets. Mr. West brought in offsets which we were willing to allow, reducing his overdraft, after adding interest thereon for a number of years, to a few thousand dollars, but so far from his being satisfied with that we were willing to allow, he claims that we owe him $6,336.17, and has filed a Mechanics Lien upon the new buildings which have been erected in Portsmouth, formerly belonging to Bain & Brother, as due him over and above this offset of $52,000. We found Messrs. Armstrong, Son & Company were entitled to be credited with several notes which reduced their amounts to nothing, and upon a settlement of all Mr. Armstrong's matters with Bain & Bro. through Judge Watts, his Counsel, we received from Armstrong & Son a little over $200, if my memory serves me right, as due by them, and that was, from his standpoint, a concession on his part, rather than have a lawsuit. We found that Etheridge & Brooks had large offsets against Bain & Brother, amounting to nearly $30,000. The Greenville Land & Lumber Company matters are in such a condition that nothing can be expected from that, so that it may be said that this large amount of overdrafts, so far as it appears in the assets, may be estimated at $3,000 to $5,000, not exceeding $5,000. Another large overdraft there of Mr. L. D. Ames is disputed, he claiming an offset against his overdraft. I think the overdraft is about $1,800.00, but he claims offset of about $1,100; of course that is included in the $111,000.

Q. 20. Please state what is the character of the claim of John E. West against Bain & Brother.

A. The Claims of Mr. West are for work done on the buildings of Bain & Brother, and the individual members of the firm, labor and supplies of various kinds running through a number of years and amounting according to his statement, very nearly $60,000.

Q. 21. You have referred to Wallace & Sons' overdraft and to the fact that the amount of it was not extended on your list of overdrafts—please state why not.

A. For two reasons; one was that we have never had the credit made on the books for the amount of the purchase money in the two deeds made by Wallace & Son, heretofore referred to. Another is, and chiefly because it was understood by the trustees, which knowledge came to them

after they took charge—except so far as I am concerned—that when Wallace made a surrender of all their property to Bain & Bro., that that was to be in satisfaction of their overdrafts; that their indebtedness in other words was to be wiped out by these deeds. This matter was not so expressed as to justify the trustees themselves in giving any release of this indebtedness and they preferred to take no responsibility in the matter of cancelling it and have never done so, but from the knowledge of the fact in regard to the transaction which they have, they have never felt justified in reporting that as a substantial indebedness to the trust, even if there were any possible prospect of realizing one dollar from it, and we were satisfied that there was no such prospect. We did this in order that we might do justice to ourselves and to all parties, which has been the aim of the trustees in all their dealings and transactions with the debtors and creditors of Bain & Bro.

Q. 22. Some reference has been made in the examination of one of the plaintiff's witnesses to the fact that the stock in the Exchange National Bank was not included in the inventory and placed upon the list of stocks; please state why such was the case.

A. I understood that the script for that stock was held, or in possession of the Exchange National Bank—I know that it was absolutely worthless—we never counted it as worth anything—the script was not in our possession and I do not know that it ever occurred to me either to put it there or omit it, but if it had, I should not have put it there for those reasons.

Q. 23. Can you state in general terms what was the result of gathering the crop in the ground at the time of the assignment of Bain & Bro., and of completing the farming operations of that season to that extent—about what the net result of such completion of the farming operations?

A. I do not know as much about that as Mr. Griffin does, but my impression is that we just about reimbursed the trust fund for what had been charged against the farms on the books; we paid all our expenses and got back what was charged to the farms on the book. That is my impression, but I do not want to be put down as stating it accurately; I think some of the farms came out a little behind and some a little ahead, but if we had not gone on working the farms it would have been a total loss to the trust subject.

Q. 24. Do I understand from your answer that you got back by carrying on the farming operations of that season, the amounts which had been expended by Bain & Bro. before their failure on those farms, and with respect to those crops?

A. That is the idea I meant to convey. Some of the farms as I stated, were a little behind, charging them with what had been expended by Bain & Bro. before we took charge, but others were a little ahead; on the whole we about got back what Bain & Bro. had expended, and in that way, for that season, saved that much to the trust.

Q. 25. Can you state about how much was saved to the trust by the completion of the farming operations of that season?

A. I think from $15,000 to $20,000; I do not pretend to be accurate.

Q. 26. Please state what directions you gave as to any of the accounts on Bain & Bro.'s books after taking charge, and in this connection, as to

"Certificate Account," and how the item of $7,434.53 at the foot of that account was charged to "Wharf account?"

A. When we took charge of the books, the first thing, so far as they were concerned, was to ascertain the amount that was due to the depositors, and to that end we at once advertised asking all the depositors to bring their books so that they might be written up. We found a large number of depositors holding certificates of deposit, which were credited in what was known as "Certificate Account." I instructed the clerks to write up this account, also, because I wanted to know how that stood, as one of the means of ascertaining the indebtedness of Bain & Bro., secured under this deed. One of the clerks came to me and called my attention to the fact that there was charged in the "Certificate Account" a certificate amounting to $7,434.58, but that no certificate had ever been issued for it, and there was none outstanding to be called in. After inquiring into the matter and understanding that it was improperly entered there, I told them to take it out of that account and carry it to the proper account. This entry was brought from the account of George M Bain, executor; as I understood it; it was discussed in the office, and understanding that it ought properly to have been charged against Mr. Bain as executor in the "Wharf Account," according to the way they had done business in the office, I told either Mr. Atkinson or Mr. Maupin, I do not remember which, to make the proper entry to that effect. If this had not been done, but had I allowed the certificate to be issued, such as we issued to other parties, for the amount of that credit, it would have been a great wrong upon the bona fide creditors. This, I think, is the only entry that I have authorized or had made on the books, except in writing up that account. That ought to explain itself to anybody at first glance.

Q. 27. Please state generally the state of the indebtedness of the Greenville Land and Lumber Company, and the position taken by the trustees in regard to that matter?

A. The indebtedness of the Greenville Land and Lumber Company, exclusive of the notes of $102,000 held by the Exchange National Bank, is $140,000; with those notes is about $242,000. This estimate is gotten from a statement from the papers in our hands, and made up in negotiations between the trustees and Messrs. Watts & Hatton, the counsel for the Greenville Land and Lumber Company. Of this indebtedness Mr. Dill has settled that for which he was individually responsible, amounting to $1,190 and some interest, by paying us $1,000. The trustees, knowing that the trust subject is liable for the $102,000 held by the Exchange National Bank under the deed of trust made by Bain & Bro., and holding besides the indebtedness aforementioned of about $140,000, and holding certain assets which have passed to them under the deed in which the Greenville Land and Lumber Company hold an equity of redemption, have taken the position, and they maintain that they have a right to hold these assets for the balance that is due them by the Greenville Land and Lumber Company, upon a fair settlement of their account with Bain & Bro., after giving it credit for the value of the Meherrin Valley Railroad bonds and the Southern Telegraph bonds which were transferred by Bain & Bro. to the Exchange National Bank on March 31st, 1885. That is their position and they do not see how it is involved in any way in this

controversy; I merely state it here without undertaking now in this matter, which, I think, is entirely collateral, to controvert any position taken by Mr. Dill in his deposition, which I have read and heard, so that I cannot be precluded in any controversy directly on this subject, from maintaining the position which we hold. This matter has been in the hands of counsel employed by the trustees, who have been negotiating with Watts & Hatton for the Greenville Land and Lumber Company for several months past, and when an issue of any kind is made up for us we are ready to meet it.

Q. 28. Have you had a succinct account made out of the trust property conveyed to the trustees by Bain & Bro., not including the notes or accounts due, and containing so far as the real estate is concerned, the date of the purchase of each piece and the amount of the purchase money; if so, produce it and make it a part of your deposition?

A. I have, and here produce it and request the Master to file it and mark it as an exhibit.

(Marked exhibit X, with deposition of W. W. Old.)

Q. 29. Please state whether or not real estate is the great bulk of the trust property?

A. It is.

Q. 30. I find that one of the items under the head of George M. Bain, Jr.'s, property, being interest in the Colorado mining property, as to which the entry says the deeds are not in hand, the purchase price of that property is not stated, according to the deed; please state what is the actual value of that interest in the Colorado property?

A. As I understood it, Mr. Bain owns an interest in two pieces of mining property—or two distinct properties. One of them, I have learned upon the best authority, will not more than pay the liens upon it; the other we had hoped to realize something from. At one time it was estimated that his interest there was probably worth $6,000 after paying the liens upon it, but that turns out now to be almost worthless, and in the last few days we have signed a deed conveying the whole Whitehead and Bain interest, in which Mr. Bain was entitled to a half interest for two thousand dollars, and that is about all that we expect to realize from that entire property. In other words, like all these mining speculations, it has dwindled down to absolutely nothing. This is the Laura Dunmore, as I understand it.

Q. 31. State whether you had any knowledge, information, or notice of any kind, or any reason whatever to believe that any of the trust property was bought with funds obtained from the Exchange National Bank?

A. I did not.

Q. 32. Was any such claim set up by the bank's counsel or any one, or did you ever hear of any such claim before the bringing of this suit?

A. In all the negotiations I have had with the bank's counsel, prior to the making of the deed of trust—I do not know that I ever had any after that—no such claim was set up by him or by any one else, and I never heard of any such claim before the bringing of this suit, and always considered it, in its legal aspects, as absolutely without foundation.

Q. 33. Please state what was Bain & Bro.'s business—whether or not

they were large bankers, and what was the amount due by them on their deposit account—that is, to their depositors?

A. Bain & Bro. had been bankers in the city of Portsmouth ever since my knowledge of them, which began in 1868, when I first came to the city of Norfolk. I knew that they did a large business, the largest of any private bankers in either Norfolk or Portsmouth. I knew that they did by far the largest business of the city of Portsmouth, but I had no idea, until I was informed by Mr. Robert Bain himself, of the extent of his indebtedness to his depositors. He informed me that it was about $900,000, and since I have taken charge of the books I have found that, as they stated, on the 2d of April, 1885, the amount to the credit of his depositors was in round numbers $890,000, after deducting the amount which was due to the Richmond Cedar Works of $31,885.71. This amount has been reduced somewhat by set offs, but I estimate that after allowing all setoffs the amount found due to his depositors will be about $860,000.

Q. 34. Please state whether or not after the filing of the amended bill in this cause, containing the charge that a large portion of the trust property had been purchased with moneys of the Exchange National Bank, the Trustees made special inquiry to find out whether any of the trust property had been bought with money coming from the Bank, and if so with what result.

A. After the amended bill was filled I made enquiry into the matter and was satisfied that no such charge as that could be sustained. I met Judge Robertson here and had a chat with him in my office, and in speaking of the matter with him he said he thought they could trace some. I said I did not think so, that I had never heard of any, but, prompted by his confidence in the matter I made the most diligent inquiry and search that I was able to make and found nothing from the books or papers of Bain & Brother to lead to any such conclusion, nor was I informed of any such fact and the testimony in regard to this draft for the purchase of guano per Mt. Edgecombe, which Mr. Bain himself seems to have forgotten, because he never mentioned the matter to me—was as great a surprise to me as to anybody in the community—greater than to anybody, because I had made search and had no information from the books of any such transaction, and the same may be said in regard to one or two pieces of real estate which it appears had been paid for through the Clearing house. I had always understood from Mr. Bain that his real estate was paid for through his Banking House, and that it seems, is the facts, with one exception, but it turus out that one or two checks came through the Clearing House of which I never had any knowledge until it was brought out here in a testimony; so that when I made answer to that effect to the amended bill, I did it with absolute assurance that there was no truth whatever in any of the charges made in the bill in this respect, if they amount to anything in the decision of this cause.

Q. 35. Please state whether you had any knowledge, information or notice of any kind of any fraud or fraudulent intent on the part of Bain & Brother or of any of the members of that firm in connection with their deed of assignment; or of any facts or circumstances leading you to suspect any fraud or fradulent intent?

A. I had no knowledge, information, intimation belief or notice of any kind

of any fraud or fradulent intent on the part of Bain & Brother or any members of that firm in making the deed of trust which they made; I only knew that they were surrendering all the property that they had in the world and they instructed me to draw the deed to cover everything which they or they wives had so that the surrender might be full, complete and absolute, and it is absolutely impossible for me to conceive that a man who is surrendering everything he has to pay bona fide creditors, can do it with a fraudulent intent, simply because he wanted to dispose of his property in such manner as he thought those creditors were entitled to it, and in making such disposition of it there was no motive or object of any kind disclosed to me or to which I was a party in any way, directly or indirectly, for the purpose of keeping the Exchange National Bank from anything that belonged to it; the Messrs. Bains' purpose was to secure the creditors named in that deed; that was his object—it was not to cut the Exchange National Bank out of anything, but it was to make the distribution which they have provided in that deed so that creditors who have not received anything should get what they were entitled to out of their assets. Nor did I know of any facts or circumstances that lead me to suspect any fraud, fraudulent intent, or purpose on the part of any of the grantors in that deed. Nothing was more foreign to my knowledge in every respect. I had neither information nor notice of any kind of any fraud or fraudulent intent.

(Counsel for plaintiff here objects to all that part of the answer of the witness putting his argument and conclusion of law in these words "and it is absolutely impossible," &c., down to and inclusive of the sentence ending "creditors, &c. should get what they were entitled to out of their assets" The said answer not being responsive to the question and seeking to speak for the grantors in the deed as to what was in their minds in executing the same.)

Adjourned until 10 o'clock, April 7th.

WEDNESDAY, April 7th, 1886.

Present: Charles T. Barry, Special Master; Richard Walke, Esq.' of counsel for the trustees; Judge Garnett, counsel for the plaintiff, and John T. Griffin, trustee.

The examination of W. W. Old, witness for the trustees was resumed.

Q. 36. Are you familiar with the bills filed in this cause, and the charges made therein of fraud and of notice to the trustees, and state whether you had any notice of any sort of any fraud or fraudulent intent on the part of said Bain & Bro. or on the part of any member of that firm, either as alleged in said bills or otherwise.

A. I am familiar with the charges in the bill and the supplementary

bill touching the subject of fraud and notice, and here state that so far as I am concerned, the charges are utterly without foundation I had no notice or knowledge or belief of any fraud or fraudulent intent on the part of any person, and so far as I am concerned I had no connection with anything that savored of it.

Q. 37. Please state as nearly as you can the amount of the indebtedness secured under the deed of assignment of Bain & Bro., embracing the first and second classes.

A. I think the amount is between one million and eleven hundred thousand dollars

Q. 38. State what amount of cash came into the trustees hand.

A. When we took charge of the banking house on the 9th of April, 1885, for the purpose of opening the safe we found in cash in the safe which was turned over to us by Mr. Maupin. the cashier, with a statement showing the amount of actual cash on hand, which was satisfactory to us $14,125.26. We received from the Merchants National Bank of Richmond, which was also counted as cash $896.17. We found on deposit at the Blackstone National Bank, Boston, $2,254.64, but of this amount we received in cash only the sum of $1,847.19, an attachment having been levied upon this fund, the principal and interest of which $406.73, we after consideration determined to allow in the settlement, and of this sum of $1,847.19, $74.85 belongs to J. A. Silverthorn, that being the amount of a collection which he had deposited and which had gone to the credit of Bain and Bro. and which we found there as a part of the cash in said bank. This amount, however, has not been paid over to Mr. Silverthorn. We received from Drexel & Co., of Philadelphia, the amount on deposit with them, $17.50, and from McKim & Co., Baltimore, $666.54, and according to the check book there was on deposit at the National Park Bank, New York, $2,653.16 but this amount we have not yet received. Counting that, however, as cash, the amount of cash turned over to us, all actually received except the amount last mentioned in the National Park Bank, it aggregated $20,613.27.

Q. 39. State how much the Exchange National Bank is secured for under the Bain Bro.'s deed of assignment—how much in the first class. and how much in the second class.

A. The Exchange National Bank is a first preferred creditor after paying the costs and expenses of the trust for the notes of which Mr. Geo. M. Bain, Jr., is the sole maker, which amount to $31,000; also for an overdraft of Geo. M. Bair, which amounts to $5,823.09, an overdraft of Mrs. Annie S. Hall which he always stated to be his own indebtedness, in fact, amounting as I understand it, to about $7,000 (seven thousand dollars,) though I cannot say that I am correctly informed as to this amount. That makes, according to my estimate, $43,000 or $44,000. In the second class the Exchange National Bank is secured for $102,000 of notes of the Greenville Land and Lumber Company which had been re-discounted by Bain & Bro., and upon which Bain & Bro. were liable as endorsers.

Q. 40. State whether or not the trustees have given every facility to the expert, Mr. H. D. Bulkley. to examine books, papers, accounts and deeds in the hands of the trustees ?

A. We have; from the very beginning they have had our books and papers without any limitation as to their use in the Master's office, to our great inconvenience, ever since they first called for them, as the record will show; they have had access whenever they desired it, either themselves, the receiver's counsel, or the receiver himself, to books and papers in the office, and have made such use of them as I suppose they desired.

Cross-examination.

Q. 1. How long have you been a member of the law firm of Walke & Old?

A. Ever since October 1st, 1879.

Q. 2. How long before that had you practiced law alone, and did you then, and have you since then, regarded R. T. K. Bain as your regular client?

A. I commenced the practice of law in the city of Norfolk in February, 1868; on the first day of January, 1869, I formed a co-partnership with Capt. John S. Tucker and practiced law with him until August, 1872, when we dissolved. From that time until October, 1879, I practiced law alone in the city of Norfolk. I never regarded Mr. R. T. K. Bain at any time as my regular client. The first business connection I ever had with Mr. R. T. K. Bain in my life was about August, 1876, when the firm of Bain & Bro. employed me in the suits then pending in the United States Circuit Court, known as the Portsmouth Savings Fund Society suit, suits brought by Mr. Harmanson's assignee against Bain & Bro. and others. From that time up to the time that I formed a co-partnership with Mr. Walke, I have occassionally been employed by Messrs Bain & Bro. in special cases; I can now recall only three or four instances; I was employed by them in the suit known as Bain & Bro. against Buff's administrator, which went to the Supreme Court of Appeals of Virginia; in the case of the United States against Bain & Bro., which was an injunction to prevent their closing a dock in the city of Portsmouth, tried by Judge Hughes and reported in 3rd Hughes, I think, and in the suit of Keyser against Bain. With the exception of being called on probably half a dozen times during the nine years succeeding 1876 to give him some advice about a title, I never had any business connections of any kind with him.

Q. 3. Then you were not his regular counsel in his most important business, were you?

A. I do not know what his most important business was, all that I know about his business was that which was brought to my knowledge from the cases in which I was specially employed.

Q. 4. From whom did you accept a retainer as counsel on the 2nd day of April, 1885, and whose interest were you called upon to serve?

A. I was employed by Bain & Bro. and as a matter of course, I was their counsel in the matters then submitted to me.

Q. 5. When was it determined by you that Bain & Bro. should make an assignment?

A. I do not know that it was determined by me; I had no power to determine any such question, and did not assume any such responsibility.

Q. 6. Then state by whose advice the assignment was made?

A. I advised them that the only thing for them to do was to make an assignment of all their assets, as otherwise there would be a race among their various creditors for priorities, their estate would be wound up and tied up in litigation and that I thought it was just to their creditors that they should have their property in such condition that they could get the greatest benefit from it.

Q. 7. Now state, if you can recollect, at what hour you determined to draw the assignment, and on what day?

A. I had only a few minutes' conversation with Mr. Bain on the evening of the 2d of April before it was determined that the necessary result of their troubles would be an assignment, and so far as that is concerned it required very little time to come to that conclusion. Mr. Bain, speaking for himself and his brothers, stated to me immediately after I saw them that they wanted to turn their property over to their creditors. The question of beginning to draw this assignment was not particularly thought of after that until other matters preliminary thereto, of which I have spoken, were arranged. Once they were arranged I commenced to draw the assignment. The terms of that assignment had not been fully thought out. The fact that an assignment would be made was virtually settled as early as the 2d of April.

Q. 8. You have stated, in answer to question 3d of your direct examination, that you visited R. T. K. Bain at his residence on the evening of the 2d of April, 1885, in response to his summons to you as his counsel, and that he was then facing the difficulty of securing an indebtedness from Wallace & Son to Bain & Bro. of several hundred thousand dollars, which you afterwards ascertained to be over three hundred thousand dollars, and which was stated to be one of the main causes of the inability of Bain & Bro. to meet their obligations, yet the first thing you did was to advise the debtors, Wallace & Son, to sell all their swamp land and other property used in connection therewith to the Richmond Cedar Works, taking in payment the check of the Richmond Cedar Works for $31,885.71 on the broken bank of Bain & Bro. and certain notes, as you have described in very minute detail; that you then had to look to the remnant of Wallace & Son's property for security; explain, if you please, how this transaction enabled Bain & Bro. to secure the debt of $300,000?

A. I refer to my answer to the third question of the examination-in-chief for the statement that I have made therein, and do not care here to repeat it. I did not state that I put everything else aside and went to work to fix up the Richmond Cedar Works transactions; that was one of the many questions that were presented in the beginning of my engagement in this matter, and it was one of the first that was determined upon and arranged. In regard to the transaction, I have endeavored to explain that the Richmond Cedar Works was a large debtor of the Exchange National Bank. I stated the indebtedness to be about $143,000; it was about $140,000. The parties who were interested in those works were very much concerned on account of the failure of the Exchange National Bank, and also of Bain & Bro. They had what was represented to me, and what

was admitted by all present to be, a most valuable property and plant near Richmond, and were on the road to prosperity. There was no reason because Bain & Bro. had failed, or the Exchange National Bank had failed, that this disaster should extend any further than it was absolutely possible to prevent, and it was represented to me then as counsel, and to Mr. Bain, whom I was representing, that inasmuch as the Richmond Cedar Works had always been dependent upon these Wallace lands for their supplies, that if they passed under the control of others and were divorced as it were from the use to which they had been put in connection with the Richmond Cedar Works it meant the insolvency of that company, and that in that way the Exchange National Bank would be the loser of the $140,000 which it held against these works, whereas if these lands were conveyed to these works the company would be perfectly solvent; it could meet all of its obligations to the Exchange National Bank, including those upon which Bain & Bro. were endorser, amounting to about $40,000; and in that way the assets of Wallace & Son would be turned in a channel which would be a direct benefit to the Exchange National Bank, and in order to give them the means of accomplishing this and assuring their solvency, this credit of $31,885.71, which was on deposit at Bain & Bro.'s, and which was a part of their assets—that is, the Richmond Cedar Works' assets, and which were then in jeopardy—were utilized pro tanto in payment of these lands and other property, so that their assets, subject to the debts of the Exchange National Bank, were increased by just that much, and I never supposed that it would be in the mind of any person, except the depositors of Bain & Bro. at their banking house in Portsmouth, to question the propriety or advantage of such a transaction.

Q. 9. Name the persons you refer to in that answer as parties interested in the Richmond Cedar Works.

A. The parties with whom I was then in consultation as being interested were Mr. William H. Parrish, whom I understood to be the President, Mr. John Ott, Maj. T. J. Kirkpatrick, and Mr. Robert Bain, who had been interested, but whose interest had been assigned to the Exchange National Bank, and I here state, as incredible as it may seem, that Mr. Robert Bain was anxious that the Richmond Cedar Works should be put upon a footing to be able to meet all of its obligations to the Exchange National Bank and expressed himself as earnestly desirous of attaining that object.

Q. 10. Name the other parties then present who were interested in the Richmond Cedar Works.

A. Messrs. Wallace & Son were present, but took no part in the matter, except to advise with us about it.

Q. 11. What was their interest in the Richmond Cedar Works?

A. I think they owned two-fifths interest, that is my recollection. In regard to this two-fifth interest of Wallace & Son, it was transferred at the time that the deed was made to Bain & Brother and passed as part of their assets to the Trustees, and that was understood at the time that Wallace & Son made the deed to the Cedar Works, so that they were not accomplishing any purpose of their own in making that deed.

Q. 12. Did the transfer of that large and valuable part of Wallace & Son's assets to the Richmond Cedar Works increase or diminish their ability to pay their debts to Bain & Brother?

A. The consideration of this transfer was in fact paid by Bain & Brother; that is, Wallace & Son got a credit for the amount of that consideration of their indebtedness to Bain & Brother, but the assets or the property that was conveyed by their deed was put virtually in the hands of the Exchange National Bank because they held the debts against the Richmond Cedar Works, and the assets of the Richmond Cedar Works were a fund in the hand of the members of that Co. for the payment of those debts.

Q. 13. Were you also acting as adviser in these matters for Wallace & Son, and Mrs. Geo. T. Wallace?

A. I was not; as I stated before, I thought it due to myself, and I thought it due to all concerned, before I asked Mrs. George T. Wallace to execute a deed which would convey the roof from over her head, that I ought to explain to her, as a married woman, entitled to all the protection that man can give another; her rights, before executing any such paper, and I would have despised myself if I had not done it. That is the only connection I had with her as Counsel, if that may be called as Counsel; I received neither fee nor reward for it.

Q. 14. Who was Counsel for Wallace & Son in those transactions?

A. They had none that I am aware of.

Q. 15. At what hour on the 6th of April, 1885, was the deed of Wallace & Son, bearing date April 4th, 1885, completed, signed, and delivered and who delivered it to you?

A. I do not remember the exact hour; it was just before 10 o'clock P. M. according to my best recollection; it was before I recorded the deed from Bain & Brother to their Trustees; the deed was delivered to me for Bain & Brother by Messrs. Wallace & Son, or one of them; they were both present.

Q. 16. Did you accept said deed as Trustee for Bain & Brother, or as Counsel for Bain & Brother?

A. I never drew or attempted to draw any shadowy distinction in my mind at that time as to whether I was Trustee or Counsel; the fact is that while the deed to me as Trustee had been executed and was in my possession, that deed was not considered as delivered, and was not in fact delivered to me until after the Wallace deed had been executed, and I had been Counsel and was Counsel, for Messrs. Bain & Brother during this whole transaction.

Q. 17. You have said that you did not record the deed of Wallace & Son to Bain & Brother that night for the reason that said deed conveyed property exclusively situated in Norfolk County, and not in Portsmouth; are you not altogether mistaken about that; I mean as to the property conveyed in the deed; if not, what does this language in the said deed mean, to wit: "All the lots owned by the said parties of the first part, or either of them near the city of Portsmouth, and all *in the City of Portsmouth*, bought of S. M. Wilson, Trustee, and L. R. Watts, J. H. Gale and J. F. Crocker, Special Commissioners."

A. I think that there is no property conveyed by that deed in the city of Portsmouth; I think that was my impression when the deed was drawn, but Mr. Wallace spoke of having brought some of the Wilsons' property and that was to be conveyed in this deed, and he not being certain whether a part of it might be in the city of Portsmouth or not, I used

that language in the deed, but my impression was then and is now that no part of that property lies in the city of Portsmouth. I speak of the property lying in the county of Norfolk as contra-distinguished from the city of Portsmouth. There may be some property conveyed by the Wallace deed—I do not remember exactly—situated in other counties. At any rate, there was no reason on the night of the 6th of April pressing me to record the Wallace deed. I was anxious to record the Bain deed as soon as it was ready for delivery and recordation, because of the intimation which I had of an attempt to get an injunction to prevent its recordation. I heard no question of any kind raised in regard to the Wallace deed which prompted me to be anxious about its recordation.

Q. 18. At what hour and on what day was the deed of Wallace & Son to the Richmond Cedar Works signed, acknowledged and delivered, and who prepared that deed?

A. I do not know at what hour it was signed, sealed, acknowledged and delivered; I understood that the deed was executed by all parties on the evening of the 4th, but that is only hearsay; I do not know when it was delivered; I only know the fact that it was. Major Kirkpatrick, I suppose, prepared the deed, but I do not know that fact. I did not have time myself to do the clerical work and left it entirely to him and under his management.

Q. 19. Were these plans of distributing the property of Bain & Bro. and of Wallace & Son by the said deed all perfected according to your advice, after full discussion and consideration of the relations of the parties to each other and to their several creditors?

A. The question of having Messrs. Wallace & Son secure to Messrs. Bain & Bro. the large indebtedness which they acknowledged they owed them had nothing in the world to do with the distribution of Bain & Bro.'s estates among their creditors, as I understood it, but in the arrangements or settlements which I was then called on to advise about the question of the condition of the Richmond Cedar Works and its indebtedness to the Exchange National Bank and the necessities of the Wallace lands which had been used in connection with those works and which were considered necessary to their profitable use, were discussed.

Q. 20. What was the indebtedness of Wallace & Son to the Exchange National Bank at that time?

A. I have understood it to be $105,000.

Q. 21. Did you know that then?

A. I am not positively certain that I did, but it is more than likely that I did; I knew that they were indebted to the Exchange National Bank, but I do not know that I knew the amount.

Q. 22. You seem to have ascertained the indebtedness of these several parties, including the Richmond Cedar Works; from whom did you obtain that information, and did you have before you then any written statement of the affairs of the several parties whom you were so advising?

A. I had no written statement of the affairs of the parties or any of them; what information I obtained was entirely from the statements which I felt justified in accepting as true, as they had no motive that I could imagine for deceiving or misleading me.

Q. 23. Did you make any memorandum or note of what they reported

to be the amounts of their assets and liabilities respectively; if so can you produce it? I mean Bain & Bro. and Wallace & Son and the Richmond Cedar Works.

A. I made no memorandum ot the assets or liabilities of any of the parties mentioned and therefore have nothing of that kind to produce. I attempted in the beginning to make a list of the property of Bain & Bro. and of the members of that firm, but the papers and deeds were not accessible to make it complete, and I had not gone very far before I found that it would be a most imperfect piece of work and I abandoned it. I think a rough sketch of the Messrs. Wallaces property was given me with its estimated value but that is in the possession of the trustees at the bank; I can produce it if it is desired and it can be found.

Q. 24. Did Bain & Bro. give you any list of their liabilities? or their approximate liablilities?

A. They did not give me a list of their liabilities, nor that I remember, a list of their approximate liabilities.

Q. 25. What did you understand from them that they owed and who give you the information and when did you receive it?

A. I understood from them that they owed to their depositors in Portsmouth over $900,000; that was their estimate then. I understood also that the owed the Exchange National Bank. after getting credit for the stocks and bonds which they had transferred on the 31st of March, 1885, about three hundred thousand dollars in round numbers, independent of their libability on their rediscounted paper. I also understood that Mr. Geo. M. Bain, Jr. owed about $40,000 or $45,000, for which he was individully responsible, and which is secured in that deed. It was stated to me that the notes therein named amounted to about $30,000; I did not know the exact amount of those. I also understood that Mr. Geo. M. Bain. Jr. owed other moneys to the Exchange National Bank but the bank held collaterals for that indebtedness. That is about the general understanding that I had of it.

Q. 26. Did you take the trouble to ascertain about what the aggregate amount was during the time you were acting as counsel for Bain & Bro?

A. It did not require much trouble to aggregate the figures that I have mentioned.

Q. 27. Do so and see what it amounts to.

A. It is $1,245,000, independent of other liabilities on rediscounted paper, and not including Mr. Geo. M. Bain, Jr.'s individual indebtedness, the figures of which are not given.

Q. 28. Now state what you then understood to be the indebedness of Bain & Bro. on their own paper and on their rediscounted paper and on their stock liability or on any other account whatsoever to the Exchange National Bank of Norfolk.

A. As before stated I understood their liability on their own paper to amount in round numbers to about $300,000; I understood that they had rediscounted paper at the Exchange National Bank amounting to about $550,000 in round numbers, and in this I understood were included the notes of the Greenville Land and Lumber Co., amounting to $102,000, which were secured in the deed of trust. and notes of Wallace & Son amounting to about $100,000 upon which they were liable

and endorsers, and which they were responsible for. The other notes re-discounted at the Exchange National Bank, I understood in a general way were considered good included in them were the Richmond Cedar Works notes amounting to about $40,000 of which I have spoken, endorsed by Bain & Brother, and which were considered as secured virtually, beyond question, by the transaction of which I have spoken. As to their stock liability, I do not know that I had any definite idea about it either one way or another. I knew that Messrs. Bain & Brother, and the several members of that firm had stock in the Exchange National Bank, but I do not remember now that I had any adequate idea of the amount of that stock, nor did I ever know the details in regard to it, until after the bill was filed in this case, and I made such enquiries as were necessary to enable me to state the facts in the answer which was drawn. In regard to the indebtedness of Mr. George M. Bain, Jr., I knew nothing more of his indebtedness at the Exchange Bank than that which is stated in the deed which secures it.

The amount of the notes not therein stated, I understood to be between $30,000 and $33,000; the overdraft about $6,000, and Mrs. A. S. Hall's overdraft for which he stated he was responsible to the Bank, about $7,000. As to his other indebtedness to the Bank, I never heard, except that he was in a general way indebted, and that collaterals were held for it, until I read the bill in this case; and of the notes of $3,000 due by James G. Bain, I never heard, that I remember, until I read the bill in this case.

Q. 29. From whom did you get the information you have detailed above, and was it communicated during the period between April 2nd and April 6th, 1885?

A. I think I got it from Mr. Robert Bain and during the period mentioned.

Q. 30. On what day did the Exchange National Bank fail, and did you then know that Geo. M. Bain, Jr. was its Cashier, Jas. G. Bain a Director and Vice-President, and R. T. K. Bain a Director of said Bank, and that they were large stockholders of the said Bank?

A. The Exchange National Bank failed on the 2nd of April, 1885; I knew that Mr. Geo. M. Bain, Jr., was Cashier, and I knew that all three of the parties mentioned were stockholders in the Bank, either individually or as members of the firm of Bain & Brother; in a general way, I knew that Mr. Robert Bain was a Director, and while I am not certain that I knew this, yet I suppose I knew that Mr. Jas. G. Bain was a Director, but I have no recollection of knowing that he was Vice-President, though it is possible that I may have known it.

Q. 31. Did you then know that stockholders of an insolvent National Bank was liable to be assessed for the par value of their stock?

A. I did, but I never understood, and do not now understand, that such liability is any lien upon their property to prevent a conveyance of it to bona fide creditors or purchasers for value.

Q. 32. Do you know or did you then know, what provision the National Banking Act makes as to stock of a National Bank assigned to Trustees by a stockholder of such Bank?

A. I do not know what the Counsel is aiming at; if he means to say that I know that there is any liability on the Trustees for the assessment on the stock of Bain & Brother, or the individual members of that firm, I utterly deny it and repudiate it, and I never heard of such a claim unless it may be read between the lines in the question just asked.

Q. 33. I understand you to say that you did not undertake to ascertain the amount of shares of stock of the Exchange National Bank held by Bain & Brother, or either of them, individually, at the time of their failure. Is that so?

A. That is so; I do not consider that it was a matter that I had anything to do with, or any concern with, so far as I was called in to make a deed by Bain & Bro. to convey their assets for the purpose of securing their bona fide creditors.

Q. 34. Does the conveyance of Bain & Bro. to you and your co-trustees hinder and delay the Exchange National Bank from the collection of the stock assessment against Bain & Brother and the several members of the firm?

(Question objected to by counsel for trustees as involving a legal question.)

A. Any deed made by a debtor to a purchaser for value or to a trustee, to secure bona fide creditors, who is a purchaser for value, is, in the view taken of it by the counsel asking this question, a means of hindering and delaying a creditor who is not secured fully by such deed, and if that is the meaning of this question, I say that in that sense, and that only, is the Exchange National Bank hindered or delayed in the collection of this assessment.

Q. 35. If the total indebtedness of Bain & Bro. is $2,500,000, principal and interest, what proportion of that would the assets in your hands suffice to pay?

A. Does the counsel mean without any reference to the priorities given in the deed?

Q. 35½. Yes; I mean that?

A. I estimate the assets, in round numbers, to be between $400,000 and $500,000, as I stated yesterday. If they amount to $500,000 that would be a dividend of 20 per cent.; if they amount to only $400,000 it would be a dividend of 16 per cent.

Adjourned to meet at 10 o'clock on April 8th, 1886.

THURSDAY, April 8th, 1886.

Present: Chas. T. Barry, Special Master; Judge Garnett, counsel for plaintiff; Richard Walke, Esq., of counsel for trustees.

The examination of W. W. Old was resumed.

Q. 36. When did the trustees take formal possession of the banking house of Bain & Bro.?

A. My recollection is that we opened the safe on the morning of April

9th, but the property was all legally and constructively in our possession from the time that the deed was delivered and admitted to record, and the trustees accepted the trusts therein provided. I think that Mr. Griffin, on Tuesday, the 7th, formally signed the deed, and when it was recorded in Norfolk county his signature was recorded with it. Mr. Jenkins was not in the city of Portsmouth or Norfolk when the deed was executed and delivered, and I think he reached here on the 8th, when the three trustees proposed had their first formal meeting, and from that time Mr. Jenkins also actively accepted the trusts under that deed and has so continued since.

Q. 37. Did you employ R. T. K. Bain to remain and assist the trustees at his late banking house and how long did he so serve. Before answering the question let me request the witness to avoid unnecessary or lengthy detail, as far as it is possible so to do. This is for the purpose of speeding the examination?

A. We did not; he never served a day there in our employment, and the counsel was advised of that fact when he read the answers of the parties in this suit.

Q. 38. Then, how did he remain there and how long?

A. From the very beginning it was absolutely necessary to call on Mr. R. T. K. Bain or some member of the firm for information as to the details of a great many transactions about which we were required to take, in some instances, immediate action, or in regard to which we had to define our position. I, myself, and I can say that my co-trustees with me, were utterly ignorant of any of the details of the business of Bain & Bro., or of any of the individual members of that firm, and we desired, before taking action in any matter, to have all the information that it was possible for us to have in order that we might act intelligently, fairly and justly. For these purposes we called on Mr. Bain, as being the only member of that firm who was then in condition to render much assistance, and possibly the member who could render us most assistance. He hesitated about being seen at the old banking house, fearing that it might be thought that he was interfering in some way with the action of the trustees. The trustees insisted that he should be there to answer such questions as they were called on from time to time to ask him in regard to the details of transactions which were submitted to them for action on their part, or decision. Mr. Bain remained at the banking house, having nothing else to do, and nowhere else to stay, unless he remained at home, during the months of April, May, June, July and August, perhaps, but he was not there constantly, but only as the occasion required; sometimes he would be absent for two or three days at a time, until we sent for him. This was about the service he rendered: it was rendered at our request and without fee or reward—the question of compensation was never thought of.

Q. 39. Was he of great assistance to the trustees, and in what way?

A. He was, unquestionably, and in explaining a great many matters to us which it would have been difficult for us to have understood without his explanation, in connection with the papers we found, in informing us

of his assets, and enabling us to take possession of the estate wherever found. He has never withheld his assistance in this respect.

Q. 40. Did he seem to be familiar with the books and papers, and know more about them than any other member of the firm?

A. He seemed familiar with his books and papers; so far as my experience has gone he knew more about them than any other member of the firm. I have never had any experience, except in a very casual way, with the other members of the firm in regard to the books.

Q. 41. Are you yourself or your co-trustees familiar with accounts and bookkeeping, and could you readily understand the system in use by Bain & Bro.?

A. I cannot speak for my co-trustees on that subject. As for myself, I never was educated as a bookkeeper and never followed that business; I claim to have the capacity to understand anything which ordinary men can learn, when I turn my attention to it, but I have never turned my attention to bookkeeping. I do not know whether I could understand the system of bookkeeping as employed by Bain & Bro. unless I turned my attention to it; if I did I suppose I could.

Q. 42. Did R. T. K. Bain have any difficulty or hesitation in explaining to you anything that the trustees desired to know about any of the accounts on his books?

A. I do not recall that he did at any time.

Q. 43. Was R. T. K. Bain, as far as you knew, before the failure the active manager of the business of Bain & Bro.?

A. I do not understand what is meant by the term active manager of a firm. In my transactions with the firm of Bain & Bro. I came in contact with the three members of that firm, but more with Mr. Robert Bain than with the others. Mr. James G. Bain I generally found at the banking house, I suppose attending to his department of the business. That which brought me in contact with the firm generally brought me in contact with Mr. Robert Bain, and during Mr. Thomas A. Bain's life I also came in contact with him.

Q. 44. But R. T. K. Bain was the only one of the firm with whom you dealt in arranging the terms of the assignment, was he?

A. Mr. R. T. K. Bain was the only member of the firm who was in consultation with me, generally from the 2d to the 6th of April,; I met Mr. James G. Bain at the house also, and I saw him on the 6th.

Q. 45. Did you see Mr. George M. Bain, Jr., during that time, or was it only when you went to him with the deed signed by R. T. K. Bain and his wife?

A. I never saw Mr. George M. Bain, Jr., at all; I did not go to him with the deed for him to sign; if I had not been named in that deed as a trustee I would have done so; but for that reason I did not carry him the deed for him to sign. I drew the deed, under the instruction given me, for Bain & Bro. and the individual members of that firm, and up to the time of drawing that deed I occupied solely the relation of counsel, but when the deed was about to be drawn and it was insisted that I should name myself as one of the trustees; after the deed was drawn, as I understood it, entirely in accordance with their instructions, I took no steps to

induce anybody, or which might be construed as inducing anybody, to execute a deed to me as trustee.

(Counsel for the plaintiff here again begs the witness to confine his answer as strictly as possible to the question propounded.)

Q. 46. Did you consult with James G. Bain during that time and inform him of the various deeds and transfers you were then preparing?

A. In regard to the Wallace deeds, I was acting for the firm of Bain & Bro. and it never occurred to me for a moment in acting for the firm through one or more of its members, and in securing a large indebtedness, that I had to go and see the other members of the firm to know whether they ratified or approved the act which their partner was authorizing me to do as counsel. Mr. Jas. G. Bain, I suppose, so far as there was any reason for his being a party to it, knew all about the transaction; he was there,and I supposed that it was understood by all of them; but whether so or not, it was done in the interest of the firm of Bain & Bro. In regard to the deed of trust which they were to execute, I drew that deed under instructions, after advising the parties as fully as it was in my power as to their legal rights, and for reasons of delicacy which I have given above I did not myself go and present that deed to Mr. Geo. M. Bain, Jr for his signature, but I have no more doubt of his absolute and complete assent to it and its terms and all its provisions than I have than I am sitting here, and I know that Mr. Jas. G. Bain assented to them, because he voluntarily did that in my presence at Geo. M. Bain's; and then, the signatures of the parties are a guarantee of their full approbation, apart from their answers in this cause.

(Counsel here again remonstrate with the witness that question 46 required a very short and simple answer, and begs him not to extend his answers into lengthy arguments.)

Q. 47. Where did you spend both the days and nights between April the 2nd, and April 6th, 1885?

A. On the 2nd of April, 1885, as I before stated, I went to Mr. Bain's about half past six o'clock; I think I left there about half-past 8—probably a little later—and went to my house at 104 Freemason St., Norfolk, and spent the night. The next morning I came to my office on my way to Portsmouth, desiring to see my partner Mr. Walke, whom I had not seen after leaving him at Princess Anne on the day before, and while there Mr. Thom came in and detained me a few minutes in the interview of which I have spoken, with him on that day. After talking a few minutes with Mr. Walke and letting him understand our relations to Messrs. Bain & Bro., and also desiring to consult him on two or three matters, I went to Mr. Robert Bain's, reaching there a little after twelve o'clock and remaining there until eight o'clock that evening when I again went to my house and spent the night. The next morning I again went to Mr Bain's, reaching there about ten o'clock and remained until about eight o'clock when I again came and spent the night. Sunday I went to church in the morning and in the afternoon, and about eight or nine o'clock at night, desiring to be at Mr. Bain's early Monday morning, I went over to

his house in company with Mr. Walke to spend the night. I remained there that night and the next day and the next night until six o'clock, when I got up, the deed having been drawn, executed, delivered and recorded, and came home and met Mr. Thom on the street, as he has stated.

Q. 48. How far is it from R. T. K. Bain's residence to the residence of Geo. M. Bain, Jr. and the residence of James G. Bain, and were these parties easily accessible to you during these four days?

A. I do not know how far these gentlemen reside from Mr. Robert Bain's but I suppose it is less than half a mile and more than a quarter of a mile. I suppose those parties were accessible if there had been any occasion in the pressure of business then for me to have called on them.

Q. 49. You have alluded to your interview with Mr. Thom; did you know when he called on you on the 3rd of April, 1885, that he came as the counsel for the Exchange National Bank and that his purpose was to prevent a preference by Bain & Brother against the Exchange National Bank?

A. I knew that he called as counsel for the Exchange National Bank, as he so stated to me, but I did not know and have yet to learn that he called in order to prevent a preference against the Exchange National Bank. I never recognized that Mr. Thom, as the counsel for the Bank, as I understood it, had any right to prevent such a preference, and I never understood from him that he claimed any such right.

Q. 50. Did you say that Mr. Thom then informed you that R. T. K. Bain had promised him on the 31st March, 1885, not to prefer against the Exchange National Bank?

A. As I stated in my examination in chief, he did say that Mr Bain had made him a promise that in case Bain & Brother should be compelled to make an assignment that they would not prefer against the Exchange National Bank, but the promise was just such as I have already stated in my examination in chief.

Q. 51. Did you ascertain from R. T. K. Bain that what Mr. Thom said about that was true?

A. Mr. R. T. K. Bain stated to me when I called his attention to what Mr. Thom had said, that he had made such a promise to Mr. Thom.

Q. 52. Have you any objection to state whether you gave Mr. R. T. K. Bain any advice in regard to his obligation to keep that promise?

A. I have not.

Q. 53. Please do so and say what that advice was?

A. Upon the facts as I understood them, and as I have no doubt there were, I unhesitatingly told Mr. Bain that there was no legal enforceable obligation resting upon him or his brothers, by reason of that promise; that I did not understand that Mr. Thom, as the counsel for the Exchange National Bank, so claimed. On the contrary I understood him to admit the correctness of my views on that question, and that being the case, that it was a moral obligation, the violation of which I would not dare undertake to advise him about and I never did advise him to break it, simply because I considered it beyond my province, as his legal counsel at that time, and I would not assume any such responsibility, simply and solely from a moral point of view.

Q. 54. What reason did R. T. K. Bain give for wishing to violate that promise?

A. The solution of that question, as I have stated, I left entirely with Mr. R. T. K. Bain; he told me that he thought that it would be a great wrong, not only to his depositors in Portsmouth, as his matters then looked to him, but also to his brothers, that he should keep that promise and should impose upon them the burden of keeping it; that it was made at a time and under circumstances which had altered and for a purpose which had not been accomplished; so that he no longer felt that it was morally binding upon him, and that to keep it would be the means of his doing a greater wrong to others who were not parties to that promise and who had not assented to it in any way, than he would wrong himself by breaking it. That was about the view that he took of it. I think probably he expressed himself more forcibly than I have expressed myself.

Q. 55. You know then that he hesitated to bind his brothers also, by that promise.

A. He hesitated to call upon them to keep a promise which he had made and which he knew, if he insisted upon keeping it, that his brothers would feel it equally binding upon them to keep. These brothers are as united as any three brothers I ever saw; they generally stand or fall together.

Q. 56. What view did his brothers, George M. Bain, Jr., and James G. Bain, take of their obligation to keep that promise?

A. I do not know.

Q. 57. You did not then inform them that you knew anything of such promise, did you?

A. I did not; I did not suppose that I was called upon to give them information which I supposed they already had.

Q. 58. Nor did you in any way, directly or indirectly, consult the wishes of George M. Bain, Jr., and James G. Bain about keeping this promise?

A. I did not; it appeared to me to be more a matter personal to Mr. Robert Bain than with either of his brothers.

Q. 59. You say in your answer to question 3 of your direct examination "There were rumors floating in the air of one kind and another which only caused the excitement to increase as the hours sped on;" what rumors do you mean and what excitement was increasing?

A. There was a good deal of excitement in the city of Norfolk among the depositors of the Exchange National Bank; they were holding meetings at different hours in the day and passing resolutions, taking steps of one kind and another, looking, I suppose, to their protection in that crisis. The depositors of Bain & Bro. on the Portsmouth side—in the city of Portsmouth and surrounding counties—numbering about one thousand, and many of them having all that they had in the banking house of Bain & Bro., were anxious in regard to their deposits. The people in this country, some of whom have never realized that the war is over, took up an idea, on the one hand, because the Exchange National Bank was a national bank and Messrs. Bain & Bro. were directors in that bank, that they had a right, or some right, to prevent any assignment by Bain & Bro. which would leave any of their indebtedness to the Exchange National Bank unpaid, and a great many people on the Portsmouth side, being impressed with somewhat the same idea, that there was some power in the fact that

this was a National Bank, and that they could by virtue of that power sweep everything from them on their side of the river, were naturally anxious and fearful that some such attempt would be made, although they were assured by any wise counsellor to whom they applied that such a thing could not happen; but still those counsels did not, in all instances, allay the excitement and anxiety which the disasters of the 2d of April had produced in the two communities. That is about as simple an analysis of the feeling and its bearing upon the controversy as I can give.

Q. 60. State what were those rumors that you heard, and did they relate to Messrs. Bain & Bro. and their connection with the Exchange National Bank?

A. The rumors to which I especially referred were those in connection with an effort on the part of the depositors of the Exchange National Bank and their committee of fifteen, I believe they called it, to get an injunction, first to prevent Messrs. Bain & Bro. from making an assignment of any kind; and second, after it was made to prevent its recordation.

Q. 61. How were Bain & Bro. and their relations to the Exchange National Bank concerned in these rumors?

A. Because Bain & Bro. or the members of that firm were directors or officers of that bank and the firm was indebted to the bank.

Q. 62. And did you then understand that these rumors and this excitement were caused by the knowledge of this large indebtedness of Bain & Bro. to the bank?

A. I suppose that the reports in the papers of the indebtedness of Bain & Bro. to the bank had something to do with the excitement, but I do not know that fact, because it was also known that they were largely indebted to their depositors in the city of Portsmouth, and it was a sort of race to throw their matters in confusion. It appeared to me to be an effort to deter them from doing what they might think to be justice to other parties as well as the Exchange National Bank.

Q. 63. Who was making an effort to deter them from doing justice to the Exchange National Bank?

A. I did not say that anyone was deterring them from doing justice to the Exchange National Bank, but I mean to say that the idea was to deter them from doing justice to their depositors in Portsmouth, and so ignore them that the Exchange National Bank would get more than its share of their assets, and if the counsel had allowed me to explain the apparent obscurity in my language in my last answer I would have done it and saved this question.

Q. 63½. Did any of these rumors which you refer to relate to the management of the affairs of the Exchange National Bank by its directors, and among them Messrs. Bain & Bro.?

A. So far as I was concerned, and my position in this community at that time, I heard nothing about these matters that did not relate in some way to the saving of the assets of the Exchange National Bank or have some connection with that purpose. I was in Norfolk but little, while here, generally in my office, attending to my business, and when on my way from Norfolk to Portsmouth I had little to say to anybody, and as far as the Exchange National Bank depositors were concerned, they had little to say to me; some of them whom I had known all my life refused

to speak to me on the streets simply because they thought that I was counsel for the Messrs. Bain at that time. The only rumors that I concerned myself with were those which related to an obstruction of what I conceived to be Messrs. Bain & Bro.'s indubitable right, under the laws of this land, to make the distribution of their property and assets to their bona fide creditors in such manner and by such means as they saw fit, and I gave myself very little concern about anything else and did not stop to think or to talk about rumors and other matters, if there were any.

Q. 64. You did not, then, inquire into the foundation, truth or falsity of the rumors, if there were any, about other matters than the anticipated application for an injunction to stop the assignment of Messrs. Bain & Bro., did you?

A. I do not know to what counsel refers when he speaks about rumors of other matters; I have only spoken of the rumors which affected me, and I do not recall any other.

Q. 65. Did you read the daily papers of that period, and during those four days from April 2d to April 6th, 1885?

A. I suppose I did, though I do not remember that fact; I suppose every intelligent man in the whole community read the newspapers.

Q. 66. Were you not favorably situated to know what was going on in both communities in regard to the action of both sets of depositors, the Exchange National Bank and Bain & Brothers', as you were back and forth between both cities?

A. I was not; on the contrary, I was busily engaged from morning until night and sometimes late at night in the business in which I had been retained. I kept posted as far as I could in regard to the action of the depositors of the Exchange National Bank and was advised on Monday evening of their attempt to get an injunction to prevent the recordation of that deed.

Q. 67. Did you neither see in the daily newspapers of that period nor hear from other sources reports of mismanagement and illegal use of the funds of the Exchange National Bank by its cashier and its directors, Bain & Bro.?

A. I think I read such charges as the newspapers had.

Q. 68. And do you here say that you did not attempt to ascertain the truth or falsity of such charges?

A. From whom, from the newspapers?

Q. 69. From either the parties themselves, Messrs. Bain & Brother, or from any other available source?

A. So far as Messrs. Bain & Bro. are concerned and so far as such information as I had from them on the subject was concerned, they always stoutly denied that the rumors in the newspapers did them justice.

Q. 70. Did you seek information from the agents of the Comptroller, in charge of the bank?

A. I did not.

Q. 71. Or did you take any other evidence as to those charges than the denials of Bain & Bro.?

A. I did not ask them for the purpose of getting information about charges such as were made in the newspapers, as having any effect or bearing, directly or indirectly, upon their rights to dispose of their property.

Such information as I got from them on that subject I got incidentally and never felt called on to make any inquiry about it either one way or the other, as affecting their right to make their assignment.

Q. 72. You say in your answer to the last question on your direct examination that from the very beginning you have offered "every facility to the expert and the receiver and his counsel to have access to and examine all our books and papers, &c.:" was this done voluntarily or in obedience to the order of this Court, entered on the 11th day of November, 1885?

A. It was done in obedience to an order of the Court, to which we virtually consented, or did not resist, and in that way it may be said not to have been done unwillingly.

Q. 73. Please look at the following correspondence between the receiver, Mr. Wm. H. Peters, plaintiff, and the trustees, Messrs. Old, Griffin and Jenkins, the defendant, being first a copy of a letter of the plaintiff, dated May 22d, 1885, and secondly, two letters from the said trustees, dated respectively May 23d and 25th, 1885, and say whether the plaintiff therein requested that the trustees allow the books of account and papers of Bain & Bro., mentioned in their deed of April 6th, 1885, to be opened to his inspection, and whether or not the trustees refused that request?

(The Master is requested to file the said letter as an exhibit with the deposition of W. W. Old, cross-question 73, marked "K."

A I suppose the letter purporting to be a copy of the letter from Wm. H. Peters, receiver, is a true copy—I assume that to be fact—the other two letters mentioned are original. On or about the 23d of May, 1885, the letter from Wm. H. Peters, receiver, was received by my co-trustees in my absence and upon my return to the city the letter of May 25th, 1885, was written. At that time we did not understand, and do not understand now, that the receiver or his counsel had any right to come to our office, claiming against the deed under which we are trustees, and rummage our books and papers, and we denied that privilege, not knowing the object for which it was asked, nor what was expected to be obtained from our books. Afterwards the receiver made an application in this Court for the purpose of enabling them to go and search our office, as we supposed, fishing for evidence, and we resisted it, and the Court denied the motion; though at that time we stated in Court, through our counsel, and I, in person, assented to it, and told the receiver and his counsel that they could have copies of any papers in our office in which the Exchange National Bank had any interest, and in which they claimed any interest, and the counsel refused the order; I have the order now in my office which we wrote and offered to the Court, which we were willing to assent to, and which you refused.

Q. 74. You say in answer to question 34 on direct examination that after the amended bill was filed you made inquiry into the matter to find out whether any of the trust property had been bought with any of the money coming from the Exchange National Bank; did you make any such inquiry before the amended bill was filed?

A. I did, sufficiently to answer the allegations of the original bill, so far as it was in my power, but after the amended bill was filed, the main point

of which was that the money of the Exchange National Bank could be traced into property which was held by the trustees under the deed of trust from Bain & Bro., and when that seemed to be regarded as an issue in the cause I made more diligent inquiry into the matter, and after the conversation with Judge Robertson, of which I have spoken, I made still more diligent inquiry, and from all the information I had, and from all that the books and papers which I examined informed me, the result was just as I stated. My impression is—though I do not remember the details—that in the answers to some of the interrogatories by some of the defendants they said, in stating the manner in which they used moneys which they had borrowed from the Exchange National Bank, that perhaps they gave a list of some property which possibly was in the hands of the trustees, and I do not mean to refer to the facts as stated in those answers; I am only speaking of what does not occur in the records in the answers.

Q. 75. Having attended, as you did, the examination of the books and papers of Bain & Bro. before the Special Master, and heard and read the evidence there taken before him, look at your answer to the amended bill in this cause and say whether, with the knowledge you now have, the following part of that answer is true, to wit: "These defendants, further answering, deny the charge contained in said amended bill, that a large and valuable part of the personal and real estate of Bain & Bro. and of the individual members of said firm was purchased with the moneys of the Exchange National Bank of Norfolk, which the said R. T. K. Bain, Geo. M. Bain, Jr., and James G. Bain, while occupying the position of cashier and directors of the said bank, and as such sustaining fiduciary relations to said bank, have fraudulently misappropriated to their own use; they deny that any of the property was so purchased by the said firm or the individual members thereof"?

A. To answer this question would take a great deal of time—more, perhaps, than the witness ought to give, and it would require a familiarity with the testimony and the details thereof which I do not possess, for while I have been in attendance upon the Master here from time to time, and have a general idea of what has gone on before him, I am not familiar with all the details—not as familiar as my counsel—but from my knowledge of the evidence I think that portion of the answer which has been quoted has been fully sustained. If I understand it, and I do not mean to speak with that particularity as if I had the whole record before me, they have proved that two or three pieces of real estate purchased by Messrs. Bain & Bro. or the individual members of that firm subsequent to 1880 have been paid for by checks on Bain & Bro. which have passed through the clearing house; that, as I understand it, is the extent of the proof in regard to this real estate. Touching the payments through the clearing house, I here affirm, from my knowledge of the books, that thousands and thousands of dollars have been deposited in currency in the Exchange National Bank to the credit of Bain & Bro. since those checks passed through the clearing house, as the books here before the Master show, and I say that it is beyond the ken of any human being to trace any particular money that was obtained by Bain & Bro. from the Exchange National

Bank on their discounts, or otherwise, to the payment of those identical checks through the clearing house, and so far as those clearing house transactions are concerned I have always understood that that was no longer an item of indebtedness existing against Bain & Bro., except so far as they may be responsible on their guarantee of March 31st, 1885. So much for the real estate. In regard to the personal property, if I understood the evidence they have traced a draft for $59,000 in round numbers, which was given in 1884 for the purchase of the cargo of Mt. Edgecombe guano, and which was paid for through the clearing house by the Exchange National Bank, and which was taken up by notes discounted by Bain & Bro., one-half of which the Exchange National Bank still holds, and the other half of which Bain & Bro. holds, and that all this guano was purchased by this draft. A few bills standing upon the books of Bain & Bro. against various parties to whom the guano had been sold have been collected by the trustees. These facts we never knew until this investigation commenced, and there is not a line nor a scintilla in the books, open to the gaze of any ordinary man, that would lead him to suppose that these transactions could have been traced, and that is the extent of tracing the property, so far as I understand it, and I think that the trustees might still say that no considerable part of this property was purchased by money of the Exchange National Bank on the theory of the plaintiff in his bill and supplementary bill, even supposing that all of this property is properly and legally traced and identified. In regard to the mining stocks I have said nothing, because they are worthless, and as I have always understood the mining stocks, which have been traced directly to moneys of the Exchange National Bank, are now held by the receiver. As to Mr. George M. Bain, Jr.'s, purchase of mining property, he has secured the Exchange National Bank out of his individual property for more than they have traced to him, and that is a preferred claim under the deed of trust in which we are trustees.

Q. 76. Then you do not claim to be familiar with the evidence taken before the Master; do you?

A. I stated that I was not familiar with all of its details, but I have stated clearly and succinctly the result of it.

Q. 77. Describe the diligent efforts you made to trace the funds of the Exchange National Bank into the property conveyed to you by Bain & Brother.

A. Well, I examined the accounts, as far as they were accessible to me, in our possession, between Bain & Brother and the Exchange National Bank, the books of Bain & Brother, and examined Mr. R. T. K. Bain and the clerks in the office in regard to the matter, so far as they had any knowledge on the subject, and say here that there is nothing on the books indicating any such appropriations of any moneys of the Exchange National Bank. Mr. Robert Bain always told me the charges were utterly without foundation; that the property they purchased was not paid for in that way, and I think that he was much surprised, probably as anybody else, when in the thorough investigation made by the expert, it turned out that two or three pieces of property were paid for that way. I never doubted that he told me what he believed to be the truth in the matter; he certainly had no motive to do anything else.

Q. 78. Did the books and accounts of Bain & Brother afford you any information on this subject?

A. That is what I have stated, that they do not, and I understand they do not because the fact is not so, except perhaps in the two or three instances which have been traced though the clearing house.

Q. 79. But if those instances are correctly traced, do you know that those are all the cases in which the funds of the Exchange National Bank have been used by Bain & Brother in the purchase of real and personal estate now in you hands?

A. Those are the only instances of which I have any knowledge, or have any reason to believe there is any foundation, in theory even, for, so far as I am concerned, and assume that I am safe in saying this—that the examination of two experts, paid for by the Exchange National Bank, who have had unlimited access to our books before the Master, has failed, as I understand, to show that they could put their finger upon one single piece of property which they can say was directly purchased with the funds of the Exchange National Bank, other than the bills of guano, testified to by Mr. Bulkley.

Q. 80. Do the books of account of Bain & Brother show you how they invested moneys in the large amount of stock which they purchased?

A. They do not, so far as I know; neither do they show when that money was taken from the deposits in the city of Portsmouth and invested in stocks or property.

Q. 81. Do their books show you satisfactorily, even approximately, what amount of money they had invested in real estate?

A. They do not; I have always understood from Mr. Bain that if his books were written up, the papers in his office would show the investments in real estate, but the trustees have never undertaken to write the books up, merely as a matter of gratification to themselves or others; it involved great expense which we were not willing to put the trust subject to, but we had no other motive in the world for not writing them up than that. There was no benefit to be derived from it, and I think Mr. Bulkley, when he was in the office examining these things, admitted the correctness of the views of the trustees in that matter.

Q. 82. Do you know any other written evidence than the books and papers of Bain & Bro. which could by any possibility show the amounts which they had invested in both real and personal estate at the time you took charge of their business?

A. I did not aim to get at the real estate owned by Messrs. Bain & Bro. and the individual members of that firm, which composed the great hulk of their assets, by going to their books. We took the more direct and practical mode of going to the records and getting the original deeds where they were not found in the office; or having copies or extracts made; and ascertained in that way the trust subject. That was the most direct way and the easiest one to us, and besides, whatever the books may have shown, it was at any rate the last resort; even in that case, in order to get a description of the property, and I cared nothing about what the books showed, so I found the deeds.

Q. 83. That was all very well as to the real estate but how about the

personal estate—was there any written evidence as to where all that was?

A. I do not know that there was; I know that we took charge of all the bills receivable that we found in the office, and that list corresponded with the books at that day, so far as I could understand or was informed. The other personal property on the farm, and at the brick-yard, we took charge of, as we found it; there was no list of that on the books of Bain & Bro., and it would have been as impossible to have kept such a list on their book, changing day by day, from one cause or another, as it would be for a merchant in his store to keep an itemized list of all his goods. We took charge of it as it was turned over to us, in bulk, and as we found it.

Q. 84. Now, have you ascertained, even at this late day, what are the liabilities of Bain & Bro.—the total amount?

A. I know about what the liabilities are secured under the deed of trust, assuming the amount due to the Exchange National Bank which is secured in the third class, to be correctly stated in these proceedings; after taking out the amount secured to the said bank in the second class, that is the only concern that I have had with the liabilities of Bain & Bro., and I think I have an idea of what they are.

Q. 85. Did you get at any idea from the book of Bain & Bro., of their indebtedness to the Exchange National Bank at the time the deed was made?

A. I had never seen the books of Bain & Bro. at the time the deed was made, and have never gone to them since for the purpose of ascertaining what they owed to the Exchange National Bank; I have always understood from the beginning of these proceedings that that amount was correctly stated in the original bill, and I have never known that there was any dispute about it, until I have read the large number of questions here in regard to it in this examination.

Q. 86. I only want to know if you could asscertain from the books of Bain & Brother what they owed the Exchange National Bank; there is no doubt about the amount of the debt, in the mind of the plaintiff.

A. I don't know whether I could or not for the reasons which I have given—I have never tried.

Q. 87 Then you made no critical examination of the books of Bain & Brother for the purpose of ascertaining what they owed the Exchange National Bank or what they had done with the money obtained from it—did you?

A. As before stated, I never examined the books of Bain & Brother for the purpose of ascertaining what they owed to the Exchange National Bank; I have had too many other things demanding my attention for me to spend the time to ascertain a fact about which I did not understand there was any dispute in this suit. I did examine the books, so far as I was able, in regard to tracing the property belonging to the Exchange National Bank, which appeared on our books, and to the best of my ability, I found no evidence whatever of that kind, and as I have before stated, the experts of the Exchange National Bank, with all their diligence, have failed to find any such thing.

Q. 88. Have you tried to ascertain what Bain & Brother did with the

large sums of money obtained from the Exchange National Bank—their books not disclosing the fact?

A. I do not understand why the counsel should suppose that I do not understand my position in this case. I do not regard it as my duty, as a Trustee under the deed in question, to examine the books to ascertain a fact which I always understood did not exist, or for the purpose, perchance, of making out his case, if he has any, and I will not be put in any such position. I deny that there is any foundation for supposing that an examination such as he indicates, would have produced any other results than those which I understand have been produced by the examination before the Master. It was sufficient for me, as Trusteee, to know that a large amount of property had been conveyed to me as one of the Trustees, to secure the depositors at their banking house in Portsmouth, and the Exchange National Bank for sums named in the deed, and my whole effort has been bent in trying to preserve this trust and increase it as much as possible, to make the best of it, and make the largest possible dividend to the creditors secured under it, and I have not been racking my brain to find out what Mr. Bain did with this thousand dollars or that thousand dollars, and have not felt called upon to do so. I have informed myself sufficiently to enable me to file answers in this case; that I felt called on to do, and I made those answers according to the best information that I had at that time and I see no reason to change them.

Q. 89. Do you know that the evidence before the Master given by Mr. George M. Bain, Jr., and confirmed by the expert examination established the fact that George M. Bain, Jr's interest in mining property in Colorado, the Boomerang and Laura Dunmore Mines, was purchased directly with the funds obtained from the Exchange National Bank?

A. In regard to that mining property, I wish to say here that I never heard of this property until late in the month of September, when upon my return from the Springs, I found a deed at the office relating to it which had been sent here for George M. Bain to sign, and which had been sent down to the office; I never saw the original deed for that property, I knew nothing whatever in regard to its purchase or the circumstance attending it. The fact of the existence of this mining property, and its standing in the name of George M. Bain, Jr. came to my knowledge after the answer to the amended and supplemental bill was filled. As soon as we heard of it we sent the deed of trust out to Colorado and had it recorded as we thought we were impelled to do. I made some inquiry into its value and found, as stated, that interest in one mine was worth $5,000 or $6,000, and in the other it was worth nothing. It has turned out that his interest in one of the mines is worth less than one thousand dollars; his and Mr. Whitehead's interest having been sold for $2,000, out of which the expenses have to come, which leaves Mr. Geo. B. Bain, Jr's one half interest less than $1,000; the other is worthless, as I understand. I make these statements as preliminary to what I shall now answer to this question. When Mr. Bain was examined I understood that it was ascertained that the purchase of this property was traced to him through the Exchange National Bank, and perhaps with the moneys of the Exchange National Bank, but I have always understood that Mr. Geo. M. Bain had secured to the Exchange National Bank all of his individual indebtedness thereto,

and that is a preferred claim under this deed, and I supposed, naturally and do still, that the money which he owed to the Exchange National Bank for the purchase of Mining property, if he purchased any, was secured in this claim. At any rate, I here say that if I had known the facts in the beginning, and been in the same position of knowing all of them that I am now, I would rather have given up those mining lands, if it was in my power as Trustee to do so, thirty times over, than to have had this litigation, if it is to turn upon that.

Q. 90. Do you mean to say that the whole individual indebtedness of Geo. M. Bain, Jr., to the bank is secured in the deed to you, and that there is any likelihood of the assets that could possibly be realized from your trust ever reaching such preference?

A. The deed of trust secures among the first class, after paying the expenses, the three notes of Geo. M. Bain, Jr., of which he is alone maker, his overdraft and the overdraft of Mrs. Annie S. Hall, which aggregate, I understand, between $40,000 and $45,000. When I spoke of the individual indebtedness of Mr. Geo. M. Bain, Jr., I cannot suppose that the counsel understood me to mean any other than that which is mentioned above.

Q. 91. Do you mean that the three notes of Geo. M Bain, Jr., or the overdraft of Geo. M· Bain, Jr., at said bank, as just mentioned by you, included any such indebtedness as that incurred by him for the purchase of this mining property?

A. I do not know that I understand particularly how this mining property was purchased, and how the indebtedness of Geo. M. Bain, Jr., to the Exchange National Bank for the money which he used in its purchase is evidenced. I have never read his deposition that I remember, but I do not remember that Mr. Bulkley showed how the money used for the purchase of this property was evidenced; whether by a joint note of Messrs. Whitehead and Bain, or whether it was included in the indebtedness of Geo. M. Bain, Jr., to the Exchange National Bank, mentioned as that evidenced by the notes of which he was sole maker, or shown by his overdraft. I had an idea—I do not know how I obtained it, and I may be in error from my want of particular knowledge of the record—that it was a part, either of his overdraft or of the notes whereof he was sole maker.

Q. 92. Then you do not know whether it is included in the above or not, do you?

A. I do not, but suppose so, for the reasons I have given.

Q. 93. Are you claiming title to the Boomerang mine in a suit pending in Colorado at this time; I mean title as one of Bain's trustees?

A. A few days after we recorded the deed in Colorado we heard that suit had been brought in the Circuit Court at Denver, Col., against Geo. M. Bain, Jr., claiming that these lands were the property of the Exchange National Bank. Mr. Bain filed his answer in that suit setting forth the fact the deed to myself and others, trustees, had been recorded, and thereupon an amended and supplemental bill was filed, making the trustees parties. We have just gotten a copy of the amended and supplemental bill, and it is in the hands of our counsel. The trustees propose to do what they are called upon to do in claiming that property under their duties

under the deed, and nothing more, but that matter is the subject of a suit in Colorado, and does not enter here, as the subject of this suit, as I understand it.

Adjourned to meet at 10 o'clock, Friday, April the 9th.

FRIDAY, April 9th, 1886.

Present: Chas. T. Barry, Special Master; Judge Garnett, counsel for the plaintiff, and Richard Walke, Esq., counsel for the trustees.

Cross-examination of W. W. Old resumed.

Q. 94. You have stated in answer to question 3 of your examination-in-chief that the deed of assignment of Bain & Bro. to you was made "after taking into consideration what had already been passed to the Exchange National Bank in the few days preceding the closing of that bank;" please state what property you refer to as having been "passed to" said bank, and specify the same?

A. I only knew what Mr. Bain himself stated to me in stating his plans and instructions for making the assignment. He mentioned the stocks and bonds and other property which are mentioned in the assignment, so-called, of March 31st, 1885, copied in the bill, and also stated that within a few days prior to the 2d of April he had turned over to the Exchange National Bank monies amounting to about $50,000, or more, and that the Exchange National Bank also held almost all of the bills receivable of Bain & Brother, and that in addition, they had all the Exchange National Bank stock, which, of course, he estimated as a loss to his estate, and all the interest of Bain & Bro. as stockholders of the Exchange National Bank, in whatever had been represented as the surplus fund. These were not counted as assets—these latter—in the hands of the Exchange National Bank, but as lost to the estate of Bain & Brother. This stock had been selling in the market as high as 150 just prior to the failure of the Exchange National Bank; that was well known, and so far as the loss to the estate of Bain & Bro. was concerned, in the ability to pay their creditors, it amounted to just that much to them at that time.

Q. 95. Then your only information in regard to that property was derived from the statement of R. T. K. Bain to you at the time, was it?

A. Of course the information which I derived in regard to these matters was from Mr. R. T. K. Bain; I was his counsel, and he stated to me, as I suppose and believe, fairly, the state of his affairs, and there was no motive that I could imagine for his either deceiving or misleading me.

Q. 96. Did he tell you at the time that the stocks and bonds passed to the bank under the agreement of March 31st, 1885, were and had been prior to that time actually or potentially, held by said bank as collateral for all of Bain & Bro.'s indebtedness to said bank?

A. He told me that those stocks and bonds were either actually in the possession of the Exchange National Bank, or were so considered, but he

never told me, and I do not think that he ever claimed that they were there for all the indebtedness of Bain & Bro.; what I mean by that is that they represented the only collaterals, if that is the meaning of the question.

Q. 97. Did he tell you that Bain & Bro. had gotten back in that transaction $570,000 of the evidences of that debt to said bank at that time?

A. He told me that their indebtedness had been reduced at the Exchange National Bank to the amount of $570,000 by that transaction, and that is what I understand is the fact.

Q. 98. What did he tell you about the turning over the bulk of bills receivable of Bain & Bro. to said bank, and when were those bills receivable turned over to the bank?

A. He did not tell me when the bills receivable were turned over to the bank; the only information on the subject given to me was that of the indebtedness of Bain & Bro. to the Exchange National Bank; about $550,000 in round numbers, was represented by paper which had been rediscounted at the Exchange National Bank upon the endorsement of Bain & Bro., and that most of this paper was perfectly good.

Q. 99. Then you understood from R. T. K. Bain that these bills receivable were already the property of the Exchange Bank, they having discounted them previously for Bain & Bro.; is that so?

A. Of course I did, but in estimating the liabilities of Bain & Bro. in the bill. and in all the charges they have brought against them, they estimated them, as they should be, contingent liabilities, and they were so stated to me.

Q. 100. You therefore knew that Bain & Bro. had received full value for both the stock and bonds passed to the bank on the 31st of March, 1885, and also for the rediscounted bills they had delivered to the bank; is that true?

A. I suppose so; I do not think there is any doubt about it.

Q. 101. Did you regard those transactions then as concessions on the part of Bain & Bro. to the bank?

A. I do not know that I ever considered it in any such light; I was not disposing of Bain & Bro.'s property; they were doing that, and I was only advising them as to the dominion and control which they had over their property at that time in such manner as they called on me, or upon such questions as they called on me to advise them.

Q. 102. And you knew at the time that Bain & Bro. owed the Exchange National Bank an immense debt, altogether unsecured by any collateral?

A. I knew that the relation of debtor and creditor existed between Bain & Bro. and the Exchange National Bank, but that did not prevent Bain & Bro. from exercising the dominion over their property which they did exercise, and which the law gives them the right to exercise?

Q. 103. Look at the inventory filed by you in this cause, pages 84 and 85, marked "List of negotiable notes, overdrafts, &c.," the aggregate of which is $334,270.22, and say what amount of solvent assets can be collected of that aggregate?

A. It would be impossible for me to answer that question with any satisfaction to myself. even with my knowledge of the trust subject, and I think I have a pretty good idea of it. In that aggregate is included the

amount of overdrafts found on the books, $111,131.93, as I have before stated. After allowing offsets which the trustees would be compelled to allow in any litigation, and throwing out those that are insolvent, exclusive of the Greenville Land and Lumber Company, which is unsettled, and which we have counted so far as nothing, I do not think that we will realize exceeding $5,000. In the amount $89,378.20, as I have stated before, there are large offsets against the claims included in that amount, and I doubt whether we will realize to the trust more than $20,000 or $25,000 out of that amount, exclusive of what they may have gotten back from the farms; I think that would be a large estimate. The list of notes due when the trustees took charge aggregates $36,631.68; against these also there have been large offsets, the amount of which I do not remember; a great many have proved insolvent—some since the failure of Bain & Bro. I think it would be a large estimate to rely on $25,000 from that source. As to the list of uncollected notes and papers due prior to the 2d of April, 1885, $53,495.35; in these notes are found large claims which have been paid off by offsets; a great many of them are insolvent, and the amount from that source is comparatively small and very unreliable. This completes the principal items in the list on the pages referred to. The notes made by the Richmond Cedar Works of $23,114.30 were considered good; they are secured by a vendor's lien on the property. The notes of John Stewart were considered good, secured by a deed of trust. The amount due on insurance ledger, $2,657.10; of these we have collected probably six or eight hundred dollars; the balance is uncollectable, as I understand it. I give these figures in a general way, because I have nothing to withhold in regard to this matter, and the counsel can form his own estimate upon what I have given upon the best judgment that I have at this time.

Q. 104. And what is your estimate of the amount to be realized by the trust from the deed of Wallace & Son to Bain & Bro.?

A. I do not think that the property mentioned in the deed will realize us $100,000; that was about the estimate that I put on it in my examination-in-chief, and I do not remember now whether it referred to all the property received from Wallace & Son, because I did not mean to include the notes of the Richmond Cedar Works in that, with which I think it will go to $100,000.

Q. 105. And what is your estimate of the personal property mentioned in the inventory from pages 45 to 82, inclusive?

A. I never made any estimate of that property, as comprehended by the question; the figures put down on the inventory will represent what we considered as its value at the time this inventory was made out, and they speak for themselves. In this list, however, is included the personal property conveyed by the Wallace deed, and is included also the personal property that was found on the various farms of the Messrs. Bain. Much of that property has been used in the cultivation of the farms this year, and we have found that the tenants have claimed an interest in all this property, so that its value to the trust fund will be materially affected if that claim is sustained. They are claiming, in fact, the whole of this property, but we are disputing and resisting it. At the time this inventory was made out we had no knowledge, notice or intimation of any such

claim, but they have set it up in the last few months and employed Mr. Crocker as their counsel. That is one of the difficulties we have had to encounter by reason of this litigation and the delay caused thereby. As to the property on the O'Niell farm, we have been selling and accounting for it, but I have no idea that the sales which we have had to make at great disadvantage will amount to as much as the inventory calls for. I will state here in justice to the counsel, who seems to have added up the figures, that it foots up $64,982.63. The bulk of this property has been sold and accounted for in our cash statements filed in this court.

Q. 106. What amout did you ascertain from the books of Bain & Bro. that they had expended in the preparation of the crops which you found on the farms when you took charge, for that season?

A. The only information we had on that subject is that which is found on Mr. Atkinson's books, and which we took off as a debit item, and it is included in that list number 7, referred to in our inventory on page 84, and in that list is charged—

To the Kay farm for 1884-85	$ 5,245 92
Beaton farm	3,452 89
Bowers' Hill	2,505 57
Moore farm	1,964 15
Prospect farm	3,354 72
	$16,523 25

We never gave ourselves any further concern about these items than to take them as we found them on the books and report them with the explanations which we gave in regard to them.

Q. 107. Do you still carry on the farm and find it profitable?

A. We do not still carry on the farms; under an order of this court we have rented them out for this year, and we never contemplated carrying on the farms; and the deed, while it gives the trustees that power, in their discretion, was never considered by the trustees as contemplating more than their making the best of the farming operations last year, that they could, and in order that they might save to the trust subject as much as possible.

Q. 108. What amount will your trust realize from the interest of Wallace & Son in the Richmond Cedar Works?

A. We have been settled with for the interest in the Richmond Cedar Work the payment of $2,500, for which we have accounted.

Q. 109. Will you state how the value of that interest was ascertained?

A. I will; and am very glad to do so. Immediately after we took charge of the trust subject Mr. Parrish, knowing we had an assignment of the Wallace interest, made a statement which I now have and which I ask leave to file as an exhibit so that I may refer to it (exhibit with the Old deposition, cross question 109) and he called on the trustees of Bain & Bro. to know what would be their attitude under the statute forming this limited co-partnership; whether we proposed to go on, upon being re-elected members of the co-partnership, in accordance with the terms of the statute, or whether we would have our interest therein, ascertained by arbiration, as provided by statute. We informed Mr. Parrish that we

certainly did not care to be elected members of the works, but preferred to have our interest ascertained. He gave me this statement showing that the assets exceeded the liabilities, including the amount due stockholders, $16,753 28. I told Mr. Parish that I was willing to receive back the original capital stock put in the Richmond Cedar Works by Mr. Wallace ($5,000), but that I had no authority, as trustee, under the deed to waive our part of this profit and loss, without arbitration; that I was willing to have an arbitration for the purpose of ascertaining what the exact interest of Wallace & Son was, and if upon a consideration of the account, upon Mr. Parrish's own statement, they should say that I should receive only $5,000 and give up any benefit in the profit and loss, that I was willing to take that sum, but not less. He agreed to it and went to Judge Watts' office at my request, and the papers were drawn submitting the matter to arbitration. He chose his arbitrator and the trustees chose theirs and I asked Judge Watts, as our counsel, to attend to the matter, having given him my instructions in regard to it. The arbitrator whom we had chosen telegraphed me that he could not serve on account of the illness of his wife; other matters pressed upon me at that time and I did not give it the prompt attention that I might otherwise have given it, not supposing that any difficulty would occur; and I supposed that the gentleman whom we had chosen would in a few days be able to serve, but before I ascertained that he could serve on account of his wife's health improving, or before we could select another arbitrator, on account of this pressure of which I have spoken, I learned that Mr. Parrish, representing the Richmond Cedar Works, was making an application for a compromise of his indebtedness. Mr. Parrish, after he had gotten his compromise, came to me and wanted me to go on with the arbitration, stating that they were insolvent. I told him that I had nothing to do with that; that that was not the understanding which I had always had with him and was not as I understood the fact to be, and I would not submit to arbitration on any such basis as that. He employed counsel in Richmond to force the Trustees to carry out their former contract of arbitration and we employed Mr. Crocker to represent us in the matter, and the result of the negotiation was that rather than have a law suit, and under Mr. Crocker's advice, we settled at $2,500 cash. Mr. Parrish always claimed that his insolvency was produced by the publication in the news papers in the city of Norfolk, through those connected with the Exchange National, of their indebtedness, in such a way as to ruin his credit, and he had assured me at the time this arbitration was first agreed upon, and before that time, that he was able to pay every dollar the Richmond Cedar Works owed, and had made such arrangements with the receiver as would enable him to do it, and I was utterly amazed when I heard of any effort on the part of the Cedar Works to compromise at 50 cents in the dollar. The statement which I have filed shows what Mr. Parrish represented to me to be the true condition of the affairs of the Company, and is substantially as was represented at the time the deed from Wallace & Son, to the Richmond Cedar Works was made. This paper was handed me, according to the best of my recollection, about the latter part of April, perhaps a little earlier, but very shortly after we took charge of the Trust subject, and negotia-

tions were opened in regard to the ascertainment of our interest in the deed under the assignment of Wallace & Son.

Q. 110. The interest of Bain & Brother in the Richmond Cedar Works was only half that of Wallace & Son—was it?

A. That is what I have understood, but I do not know the fact; I only know what the interest of Wallace & Son was.

Q. 111. Do you know of any one who can give a better estimate than yourself of the amount collectable from the Trust subject?

A. I can give my own views about it, but as to my ability to give more correct or reliable views than my co-trustees, I am not the judge. I think they have about the same ideas of the value of the Trust subject that I have. Of course they must be general.

Q. 112. And your estimate is from $400,000 to $500,000—is it?

A. That is about what I think the Trust subject would bring in open market at this time.

Re-direct examination.

Q. 1. You have testified as to a suit pending in Colorado brought by the receiver of the Exchange National Bank to recover Geo. M. Bain, Jr's interest in two pieces of mining property there, and also as to a sale of his interest in one of those pieces—the Laura Dunmore mine—for $1,000; please state whether or not the proceeds of said sale, after the deduction of expenses, are to be sent by agreement of Counsel, to be placed to the credit of said suit to await the result of its trial?

A. The proceeds are in the hands of Messrs. White & Garnett with that understanding.

Further this deponent saith not.

(Signed) W. W. OLD.

FRIDAY, April 9th, 1886.

Present: Charles T. Barry, Special Master; Judge Garnett, counsel for the plaintiff, and Richard Walke, of counsel for the trustees.

JOHN T. GRIFFIN, a witness for the trustees, being duly sworn, deposed and said:

Q. 1. What is your name, age, residence and occupation?

A. John T. Griffin; 48 years; Norfolk county; farmer.

Q. 2. Are you one of the trustees in the deed of assignment of Bain & Bro.?

A. I am one of the trustees in the deed of assignment of Bain & Bro.

Q. 3. When did you first learn that you were made one of the trustees by that deed?

A. I learned on the morning of the 7th of April, 1885, I think it was, that I was one of the trustees in the deed of assignment of Bain & Bro., but I heard it as a rumor on the streets late in the afternoon of the 6th of April, 1885.

Q. 4. State whether you had any knowledge, information or notice of any kind, or any reason whatever to believe that any of the trust property was bought with funds gotten from the Exchange National Bank?

A. No, sir; I had no knowledge or information, nor do I believe that any of the property assigned to the trustees was purchased with moneys received from the Exchange National Bank, and I never had any notice of any kind that any of this property was purchased with funds of the Exchange Bank.

Q. 5. Did you ever hear of any such claim before the bringing of this suit?

A. I never heard of any such claim before this suit was brought, and I always thought that Bain & Bro. were men of large means and owned large amounts of property.

Q. 6. Please state whether you had any knowledge, information or notice of any kind, of any fraud or fraudulent intent on the part of Bain & Bro., or any of the members of that firm, in connection with their deed of assignment, or of any facts or circumstances leading you to suspect any fraud or fraudulent intent?

A. I had no knowledge of any fraud, intended or committed, and I had no notice of any fraud—(witness asked for latter part of question to be repeated, which was done)—and there were no circumstances of which I knew that caused me to think that there was any fraud.

(Witness inquired here if it would be admissible for him to write down the question, saying he would rather do so, as the questions were long, and he wanted to be sure that he was answering all that was required of him. There was no objection, and witness writes down the questions accordingly.)

Witness, continuing his answer, said: I would say, in addition to that,

that I had no information or notice of any kind of any fraud or fraudulent intent on the part of Bain & Bro. or any member of that firm, and there were no facts or circumstances which lead me to think that there was any fraud committed or intended.

Q. 7. Are you familiar with the bills filed in this cause and the charges made therein of fraud and of notice to the trustees, and state whether you had any notice of any sort of any fraud or fraudulent intent on the part of Bain & Bro. or of any of the members of that firm, either as alleged in said bills or otherwise?

(Witness writes down the question.)

A. I am familiar with the bills filed in this cause and the charges therein of fraud and of notice to the trustees, and I state that I never had any notice of any sort, of any fraud or fraudulent intent on the part of Bain & Bro. or any of the members of that firm, as alleged in said bills or otherwise.

Q. 8. Please state what, in your judgment, is about the value of the Wallace property which came into the hands of the trustees under the Bain deed of assignment?

A. I should think that the value of the Wallace property which came into the hands of the trustees, under the assignment of Bain & Bro. was about $100,000.

Q. 9. Please state about what you consider the value of the whole Trust property, in the hands of the trustees?

A. I believe the value of the Trust property which came into the hands of the trustees, is about $425,000.

Cross-examination.

Q. 1. What association of a business character have you had with Bain & Bro., and for how long a time?

A. I have been a depositor at the bank of Bain & Bro., for the most of the time that they had been operating a bank; beyond that I do not now remember that I have any other business association with them?

Q. 2. Were you a depositor of Bain & Bro. at the time of making the deed of assignment, and to what extent?

A. I was a depositor with Bain & Bro. at the time that the bank closed and I think the amount was nearly $10,000; I would say between $9,000 and $10,000; and I will say in connection with this question that some months prior to the assignment of Bain & Bro. I had a much larger amount on deposit with them.

Q. 3. How much do they owe you now?

A. I have never received any part of my deposit at Bain & Bro.'s since the assignment, except that a portion of my deposit was used as an offset for a guano bill which I owed them at the time of their assignment; if I could be said to owe them when they had money in their possession more than sufficient to pay the guano bill, and I think the amount they owe me now is about $9,000.

Q. 4. Have you made proof of your claim before the trustees and do you know the exact amount of that claim as audited?

A. My bank book has been written up and the exact amount due me is named in this book which amount I do not now accurately remember—I will say the amount is about $9,000.

Q. 5. What amount of claims of depositors has been proved before you against the estate of Bain & Bro.?

A. I do not now remember the amount that has been proved. I would like to explain that—we have no mode of proving claims except to state what the books show is due each depositor.

Q. 6. How large was your deposit with Bain & Bro., say on or about March 1st, 1885?

A. I am not now prepared to say, but I do not think it was very much over the amount on deposit when the bank closed. The time to which I referred as having a larger amount on deposit, was at the end of the truck season of the previous year.

Q. 7. What amount was it then?

A. I think I had at one time $35,000 on deposit with Bain & Bro.

Q. 8. Did you know anything of the general business of Bain & Bro. as conducted by R. T. K. Bain, if so state briefly what were some of his enterprises?

A. I knew that Bain & Bro. conducted a banking business in the city of Portsmouth, and I knew that they were conducting several truck farms in the county of Norfolk.

Q. 9. Is that all?

A. I knew also that they sold Peruvian guano, which is all that I remember now.

Q. 10. Did you know of their connection with Wallace & Son. or with the Greenville Land and Lumber Co., or the Meherrin Valley Railroad Company, or other large speculations of that sort?

A. I knew nothing of their connection with Wallace & Son beyond the fact that Wallace & Son did business with their banking house in Portsmouth; I knew nothing of their connection with the Greenville Land and Lumber Company, or with the Meherrin Valley Railroad Company, except that I had heard that Messrs. Bain & Bro. were planting potatoes somewhere on the Meherrin Valley Railroad.

Q. 11. Did you know on the 2d day of April, 1885, the official relation each member of the firm of Bain & Bro. bore to the Exchange National Bank?

A. I know that Mr. Geo. M. Bain, Jr., was cashier of the Exchange National Bank, but I do not now remember that I knew the official relations of the other members of the firm of Bain & Bro. to the Exchange National Bank; my impression is that I knew that R. T. K. Bain was a director.

Q. 12. In all your dealings with Bain & Bro., who had chief management of that concern?

A. In my dealings with Bain & Bro. most of my business was conducted with Mr. R. T. K Bain, but at various times I have had business with the other members of the firm.

Q. 13. From their knowledge of their business who, do you say, controlled its affairs or shaped its financial policy?

A. I am not prepared to say what member of the firm controlled its affairs or shaped its financial policy, from the information I have.

Q. 14. Did you know that Bain & Bro., for many years prior and up to the 2d of April, 1885, had large dealings with the Exchange National Bank?

A. I knew nothing of the dealings of Bain & Bro. with the Exchange National Bank, except from current report, and was not aware of the extent of their dealings with the Exchange National Bank prior to the time mentioned.

Q. 15. After the 2d day of April, and while the deed of assignment was being prepared, what current reports about their dealings with the Exchange National Bank reached you?

A. I do not now remember the current reports that reached me at that time; the rumors were so numerous and so conflicting that it would be impossible for me to give them at this time.

Q. 16. Did all those rumors agree in this one fact, that Bain & Bro., the cashier and directors of the said bank, owed the bank an immense sum of money; is that so?

A. The information which I received at this time, upon which I placed most confidence, led me to believe that the amount owed by Bain & Bro. to be about $325,000. This information I received, I think, on the afternoon of the 2d of April from Mr. Toomer.

Q. 17. And you sought no further information on that subject, did you?

A. I do not now remember whether I sought any further information or not.

Q. 18. Did you know that Bain & Bro. were large stockholders in the Exchange National Bank?

A. I had heard that Bain & Bro. were stockholders of the Exchange National Bank; how large I did not know.

Q. 19. Did you hear rumors or read in the daily newspapers between the 2d and 6th of April, 1885, of mismanagement on the part of the directors of said bank and charges of fraudulent use of its money by them?

A. I read the newspapers at that time, but I do not now remember what information I received from them. As I have before stated, I heard various rumors, in the newspapers and on the street, but I am not now prepared to state what they were. I know that I placed very little reliance on rumors at that time, unless some responsible name was connected with them.

Q. 20. Did any such rumors affect the directors and cashier, Messrs. Bain & Bro., as to their management and fraudulent use of moneys obtained from the bank reach you; if so, did you pay little attention to them?

A I heard that the cashier and directors of the Exchange National Bank had allowed numerous parties to borrow large sums of money from the Exchange Bank in excess of ten per cent. on the capital stock of said bank, and, representing the Norfolk Storage Company, I called on Mr. R. H. Baker, Sr., on the 2d of April, after the closing of the Exchange National Bank, and enquired if there was anything that I could do to protect the interest of my company, which was a depositor at the Exchange National Bank and had a balance there at the time, and also to know if there

was anything that could be done to protect my own interest, I being a depositor with Bain & Bro. in Portsmouth, and I was informed by him that nothing could be done; that Bain & Bro. had a right to make—

(The answer of the witness is here objected to as irrelevant to the question propounded, and he is requested not to give any irrelevant testimony.)

Witness—I thought you asked me what attention I paid to the rumors I had heard?

Judge Garnett—I had lost sight of the last part of that question; I beg pardon.

Q. 21. The question is, did any rumors reach you charging the said directors and cashier with mismanagement of the bank's affairs and fraudulent use of its money, and did you investigate the truth or falsity of such rumors between the 2d and 6th of April, 1885?

A. As I have before stated, I heard various rumors, but had no means of investigating them that I now remember, except that I do remember enquiring of Mr. Toomer on the 2d of April, 1885, what was the amount of the indebtedness of Bain & Bro. at that time, and that he informed me, as well as I now remember, that it was about $325,000, and I knew that this was in excess of ten per cent. of the capital stock of the Exchange National Bank; beyond that I do not now remember of any other unlawful transaction of which I had heard.

Q. 22. Did you ask Mr. Toomer anything about the course of dealing between Bain & Bro. and the said bank after hearing from him that they owed the large debt, or how it was contracted?

A. My recollection is that I did not so enquire of Mr. Toomer, as I had other matters that were more pressing at that time to speak to Mr. Toomer of, and the time we were together was very short.

Q. 23. What amount, did you learn, between the 2d and 6th of April, 1885, was the probable indebtedness of Bain & Bro. to the Exchange National Bank?

A. As I now remember, I think it was about $325,000. I said that I relied on the information received from Mr. Toomer more than I did on the various rumors on the street, for I had cause to know that one rumor in the paper was not correct, as they had me down as losing a larger sum than I had lost.

Q. 24. Which one of the trustees managed the matter of the preparation and execution of the deed of assignment to you?

A. I had no knowledge as to what connection Mr. Old, one of the trustees, had with the execution of the trust deed, except that I had heard between the 2d and 6th of April that Mr. Old was in consultation with Bain & Bro.; but I would say that Mr. Old was the trustee who first spoke with me in regard to the deed after it had been recorded.

And further this deponent saith not.

(Signed) JOHN T. GRIFFIN.

Adjourned to meet at 10 o'clock Saturday, April 10th, 1886.

SATURDAY, April 10, 1886.

Present: Charles T. Barry, Special Master; Richard Walke, Esq., of counsel for the trustees, and Judge Garnett, counsel for the plaintiff.

JOHN B. JENKINS, a witness for the trustees, being duly sworn, deposed and said:

Q. 1. What is your name, age, residence and occupation?

A. John B. Jenkins; 26 years; Norfolk; lawyer.

Q. 2. Are you one of the trustees in the deed of assignment of Bain & Bro.?

A. I am.

Q. 3. When did you first learn that you were one in that deed?

A. On the morning of the 7th of April, 1885, I was informed by Mr. A. P. Thom on Main street, in Richmond, Va., that I was a trustee under the deed of assignment from Bain & Bro.

Q. 4. Where had you been residing and what was your occupation prior to the 7th of April, 1885, when you met Mr. Thom in Richmond?

A. I had been a student of law at the University of Virginia since the 1st of October, 1884.

Q. 5. State whether you had any knowledge, information or notice of any kind, or any reason whatever to believe that any of the trust property was bought with the funds obtained from the Exchange National Bank?

A. I never had any knowledge, notice, information or belief that any of the trust property conveyed by Bain & Bro. to us as trustees was purchased with funds of the Exchange National Bank.

Q. 6. Did you ever hear of any such claim before the bringing of this suit?

A. I never did.

Q. 7. Please state whether you had any knowledge, information, or notice of any kind, of any fraud or fraudulent intent on the part of Bain & Bro., or of any of the members of that firm, in connection with their deed of assignment, or of any fact or circumstance, leading you to suspect any fraud or fraudulent intent?

A. I never had any notice, knowledge or belief or suspicion of any kind that any fraud was contemplated by Bain & Bro. in their deed of assignment to us as trustees.

Q. 8. Are you familiar with the bills filed in this cause and the charges made therein of fraud, and of notice to the trustees, and state whether you had any notice of any sort, of any fraud, or fraudulent intent on the part of Bain & Bro. or of any of the individual members of the firm, either as alleged in said bills or otherwise?

A. I have read the pleadings in the case and may say I am tolerably familiar with them; I never had any notice of any fraud or fraudulent intent on the part of any of the Messrs. Bain in connection with that deed.

Q. 9. Did you have any notice or suspicion of fraud, whether in connection with that deed or otherwise?

A. I never had the slightest notice, nor any idea, nor suspicion of any fraud contemplated by any of the parties to the deed.

Q. 10. State whether or not you knew that Bain & Bro. did a large business as bankers, and whether or not you regarded them, until their failure, as solvent?

A. I knew that they did a large banking business in Portsmouth, and had reason to believe that they had a large line of depositors; I regarded them as not only solvent, but very wealthy.

Q. 11. Please state about what, in your opinion, is the value of the whole trust property in the hands of the trustees?

A. A. rough estimate shows, I think, that the property is worth about $450,000.

Cross-examination.

Q. 1. State what is your relationship to any member of the firm of Bain & Bro.?

A. Mr. R. T. K. Bain and my father married sisters; I am, therefore, the nephew of Mr. R. T. K. Bain.

Q. 2. What reason had you to believe that Bain & Bro. were very wealthy before their failure?

A. They had been conducting a large business for a number of years and I regarded them as good financiers and saw them control large interests, and concluded that they were very wealthy.

Q. 3. What other interests did they control besides their own banking business?

A. I knew they were connected with the Seaboard Cotton Compress Company, and that they owned some interest in the Exchange National Bank, which I regarded as a very wealthy institution.

Q. 4. At the time of their failure what official connection did you know they had with the Exchange National Bank?

A. I knew that Mr. Geo. M. Bain, Jr., was cashier; further than that I do not think I knew that the others had any official relation wtih the bank.

Q. 5. Did you know that R. T. K. Bain was a director of said bank at that time?

A. I did not.

Q. 6. What was the first information you received of the failure of Bain & Bro?

A. A notice was read to me from a newspaper while I was at the University of Virginia, I think on the morning of the 4th of April.

Q. 7. State why you happened to be in Richmond on the morning of the 7th of April, 1885?

A. I knew that my father was interested in the Exchange National Bank and that he would be very seriously involved by the failure of that institution; I wrote home immediately asking him to let me come home and assist him in his troubles, he told me I could and I came. I left the University of Virginia without any knowledge or suspicion that I was a trustee.

Q. 8. Was any other report in connection with Bain & Bro. and their relation to the Exchange National Bank contained in the newspaper to which you refer?

A. Nothing more than that Bain & Bro. and the Exchange National Bank had closed their doors simultaneously on the morning of the 2nd of April; this is as well as I can remember the contents of the notice.

Q. 9. State how you are now occupied, and what services you are now performing?

A. I am occupied at the old banking house of Bain & Bro. in Portsmouth, Va.; my services are to take care, as far as I can, of the assets of Bain & Bro., and see to the collection of claims due them.

Q. 10. Have you charge of the books and papers of Bain & Bro.?

A. The trustees are in charge of the books and papers of Bain & Bro. and I am at the office more regularly than any of the others.

Q. 11. I omitted to ask the other trustees, inadvertently, whether you have in hand any deeds of trust, or collateral securities, for any of the notes now in the hands of the plaintiff, discounted by the Exchange National Bank; if you have please state what they are and produce them?

A. The only collateral that I know of in our possession for notes or indebtedness due to the receiver of the Exchange National Bank are about $1,400 worth of notes which are there to secure a note of $1,100 due by the American Fertilizing Company, and the receiver has had information of that, and some of the collateral notes have been surrendered at the request of the receiver. The only deed of trust that I remember at present is one from James M. Binford; I think the indebtedness for which that was given as security has been paid.

(Note by Counsel for the Plaintiff.—This enquiry is made only for the purpose of ascertaining whether or not, among the books and papers of Bain & Bro., there may be some deeds of trust or other security for certain rediscounted bills held by the plaintiff, the makers of which say that such securities have been given, and not that the trustees are wilfully withholding any such securities.)

Q. 12. Is the estimate you have given of the probable value of the trust estate merely conjectural, or is it based upon figures given in the inventory filed by the trustees?

A. It is based to some extent upon the figures given in the inventory, and otherwise it is my own estimate.

Q. 13. What is your estimate of the amount to be realized from the list of notes and overdrafts given by you on pages 84 and 85 of the said inventory, the aggregate of which is $334,270.22?

A. My estimate would make that $85,000.

Q. 14. What is your estimate of the amount to be realized from the two items in that list, one being $89,378.20, and the other $111,131.93, being numbered in the margin of pages 84 and 85 as items 7 and 9 respectively; state the amounts separately for each?

A. I put the item marked 7 at $15,000 and the item marked 9 I would put at $6,000.

Q, 15. What is your estimate of the amount to be realized from Wallace & Son's property?

A. Leaving out the notes of the Richmond Cedar Works, which are included on pages 84 and 85, I should say about $80,000.

Q. 16. Have you made up any statement of the total indebtedness of Bain & Bro. to this date; if so, give the aggregate amount?

A. The indebtedness to depositors, as shown by the books, on the 2d of April, 1885, was $889,000 about; of the other indebtedness of Bain & Bro. we have never made an estimate; a good many claims have been filed, but I have not summed them.

Q. 17. State about what you ascertained their indebtedness to the Exchange National Bank to be?

A. My understanding is that it is $325,000 at present.

Q. 18. Is that all?

A. That is my understanding of the way the account stands at present.

Q. 19. What is the total amount proved before the trustees of Bain & Bro. and claimed of them by depositors?

A. The claims of depositors that have been proved and for which the trustees have issued certificates of indebtedness amount to $770,710.87

Q. 20. That is the total for which the trustees have issued certificates, is it?

A. The delay occasioned by the keeping of the books of Bain & Bro. so long has prevented a number of depositors who have presented their pass books to the trustees from getting certificates of deposit, and thereby proving their claims; $770,710.87 is the amount of certificates that we have issued at present.

Q. 21. How long did the trustees have all these books at the banking house before any of them were removed?

A. From April, 1885, until the middle of December, during which time we had advertised and had written personal letters to parties asking them to come in and prove their claims.

Q. 22. What amount of offsets against their deposits' claims did Bain & Bro. have?

A. About $25,000 has been allowed as offsets. I would state that others are claimed by parties indebted to Bain & Bro.

Q. 23. What amount do Wallace & Son owe Bain & Bro. now?

A. Principal, a little less than $300,000: with interest, a little over $300,000.

Q. 24. What offsets do you allow Wallace & Son on these debts?

A. The amount of the purchase money mentioned in the deed of bargain and sale from Wallace & Son to Bain & Bro., about $158,000 I think.

Q. 25. Then the difference between that and $300,000 is still claimed by the trustees from Wallace & Son—is it?

A. The understanding of the trustees is that Wallace & Son were released by the deed, from their indebtedness to Bain & Bro., by the deed before mentioned.

Q. 26. Then they owe Bain & Bro. nothing.

A. I leave that to be inferred from what I have stated.

Q. 27. Are the trustees in possession of the certificates of shares of cap-

ital stock of the Exchange National Bank belonging to any member of the firm of Bain & Bro., or to Thos. A. Bain's estate?

A. I have made diligent search and have never found them.

Q. 28. Do you know where any such shares other than those found at the said bank are now and who claims them?

A. I do not know where they are and do not know who claims them.

Q. 29. Have the trustees made enquiry for such shares of the capital stock of said bank?

A. I have been told that all the shares were at the Exchange National Bank; I did not think they were worth enquiring after.

Redirect examination:

Q. 1. You have spoken of an understanding by the trustees that Wallace & Son were released by Bain & Bro. from their indebtedness on the deed being made by Wallace & Son; please state whether or not the trustees have done anything to release Wallace & Son, if it should be that they were not released by Bain & Bro.?

A. We have given no release to Wallace & Son.

Q. 2. Have you done anything in any way to release them?

A. No.

Re-cross-examination:

Q. 1. But do the trustees in any way claim that they are not released?

A. The question has not been brought to my attention before.

Q. 1 repeated.

A. The trustees propose to carry out the agreement of Bain & Bro., I suppose.

Q. 2. What is that agreement?

A. My understanding of it is that they were released by the deed to Bain & Bro.

And further this deponent saith not.

(Signed) JOHN B. JENKINS.

WEDNESDAY, January 27, 1886.

Present: T. S. Garnett, counsel for plaintiff; Richard Walke, of counsel for defendants.

B. U. KEYSER, the expert engaged in this matter, being duly sworn, deposed as follows:

My name is B. U. Keyser; residence Washington, D. C.; occupation an examiner of banks and an accountant; aged 53 years.

Q. 1. How long have you been occupied as bank examiner and accountant?

A. About 12 years, in service of the U. S.

Q. 2. Please state whether you have made examination of the books of accounts and papers produced before the Special Master in this cause; if so, with what result?

A. I have made an examination of the books and papers referred to without any result, for the reason that the books furnished contained no general accounts since December, 1874. I say general accounts as distinguished from individual accounts. In fact, I was informed at the first meeting in this case, held in Portsmouth December 16th, 1884, at the office of the trustees of Bain & Bro., by Mr. R. T. K. Bain himself, "that no general ledger has been kept by the firm of Bain & Bro. since 1874," and my examination of the books verified that statement.

(So much of said answer as is based upon information purporting to have been received from Mr. R. T. K. Bain is objected by counsel for defendants.)

Q. 3. State what books you have examined and whether or not they are the same mentioned on pages 6 and 9 of the book of the Special Master's minutes in this cause now shown you?

A. I have examined the books referred to.

Q. 4. State in detail what you ascertained from those books as to the transactions between Bain & Bro. and the Exchange National Bank, and whether a correct account thereof can be stated from said books?

A. I ascertained nothing from those books or papers, for the reason, as stated before, that there are no general accounts from which to derive information since 1874; and further, that the accounts of the firm of Bain & Bro. with the Exchange National Bank were not kept in proper book form, as is usual between banks, but were confined to stub books of checks and pass books, which are not only unsatisfactory and incomplete for the purposes of examination, but are inaccurate.

Q. 5. Do you mean to say that no general account of Bain & Bro. with the Exchange National Bank of Norfolk is found on the books produced before the Master in the examination?

A. Only upon the pass books and stub books just mentioned; there is no ledger account.

Q. 6. State in what respects you have found the said pass books and stub books inaccurate?

A. The stub books contain no reference to the following checks, which were produced in the bundles of cancelled checks, nor have they been deducted from said stub books in carrying forward balances. (That firm, Bain & Bro., were in the habit of adding the deposits, deducting checks drawn and carrying forward the balance of each page of the stub book):

December 27th, 1884	$316,375 00
February 24th, 1885	61,921 47
February 27th, '85	125,000 00
March 5, '85	66,850 00
March 10th, '85	11,047 94
March 12th, '85	35,186 07
March 13th, '85	43,300 00
March 27th, '85	2,179 33
March 27th, '85	21,602 48

Nor do said books show the following deposits, as exhibited by the pass books:

October 18th, '84	$ 41,375 95
November 10th, '84	9,256 98
November 10th, '84	65,827 68
November 20th, '84	8,321 31
December 18th, '84	185,475 69
December 24th, '84	73,392 36
January 16th, '85	60,746 37
January 19th, '85	4,100 15
February 2d, '85	4,100 00
February 17th, '85	4,270 14
February 21st, '85	59,993 47
February 26th, '85	97,694 44
March 3d, '85	65,525 83
March 14th, '85	92,898 87
March 16th, '85	16 50
March 24th, '85	24 00
March 30th, '85	24 00
March 31st, '85	8,393 89
February 5th, '85	715 11
February 6th, '85	111 21
April 1st, '85	849 64

The pass books, on the other hand, are inaccurate, inasmuch as they contain no reference to the following deposits, as exhibited in the stub books:

October 17th, '84	$279,814 54
October 17th, '84	5,780 55
January 20th, '85	1,000 00
January 20th, '85	1,000 00
January 20th, '85	7,228 75
March 28th, '85	23,000 00

I found that many checks were missing from the bundles between October 15th, 1884, and April 2d, 1885. The books of bills receivable contain mere lists of paper discounted by Bain & Bro. They do not show

whether the same were ever paid, or if so, when or even where discounted, nor the disposition made of the proceeds. My conclusion, therefore, is that the records and papers furnished do not throw any light upon the subject under investigation, nor are they useful guides in the examination contemplated by the order of the court in this case.

Q. 7. State what books you have examined this morning and say what you have ascertained therefrom?

A. I examined this morning four ledgers of accounts with individual depositors from January, 1882, to April, 1885, containing, so far as a cursory examination permitted me to know, only one general account, namely, interest. I also examined teller's books of deposits received and checks paid from October, 1878, to April, 1885. These books, containing no general account, except the one mentioned (interest), could throw no light upon the subject under investigation.

Q. 8. On the 21st December, 1885, at your request, counsel for plaintifl asked the Special Master by letter of that date filed with him to call for books of Bain & Bro. supposed to contain the following accounts, to wit: Interest, discount, cash, individual deposits, bills receivable, bills payable, real estate investments, expenses, taxes, profit and loss and due to banks, together with journal entries thereof, daily cash balances, balance sheets, yearly balances and property accounts; state whether you have examined any such accounts, and if not, why not?

A. I have examined no such accounts, for the reason that the books contain none since 1874. By that I mean, that I have found no general ledger account, showing amounts of debit and credit to individual deposits for instance. Although I find the ledgers of individual deposits showing transactions with depositors.

Q. 9. Is there any discount account, profit and loss account, investment account, or real estate account on their books?

A. I have found no such accounts since 1874.

Q. 10. Do you find any balance sheet?

A. I find no balance sheets; probably for the reason, that there could be no balance sheet taken, where there are no accounts.

Q. 11. Will you file with the Special Master a memorandum of these several matters, and do you offer here to verify the same from the books as they are now before him, if so produce and file it.

A. I produce two memoranda of the result of my examination of the books and papers produced before the Master, and am prepared to verify the same.

Objection by counsel for defendants.

These two papers or memoranda as they are called, are objected to by counsel for the trustees, on the ground that they are unauthorized and unwarranted by the order or decree of Court under which this examination is made: that they are upon the face of them objectionable, and seem to be reports made by the witness to the Receiver or the Receiver's Counsel, and further that the witness is here in person to testify to the facts within his knowledge, and to the result of his examination of the

Books, and the introduction of such papers by him, is improper and inadmissable.

To which counsel for plaintiff replies, that the order of Court under which this examination is being had, empowers said Special Master to have the aid of an expert accountant, and the two papers produced by the expert are now addressed to the Special Master and were so originally intended to be addressed by the expert and are filed with him to assist in making his report in this cause.

To which the counsel for the trustees makes reply, that the addresses of these papers to the Special Master was made by the witness but one moment ago when the counsel for the plaintiff was making his reply to the objection made by the trustess' counsel.

Cross examination.

Q. 1. Please state whether or not the Special Master was with you at the first meeting held at the office of the trustees in the city of Portsmouth, to which you have alluded?

A. I think he was; am pretty sure he was.

Q. 2. You have testified that there was no ledger account with the Exchange National Bank on the books of Bain & Bro. but only pass books and stub books to show therefore; please state whether or not there is a ledger account with Bain & Bro. on the books of the Exchange National Bank?

A. There are two such accounts; one on the ledger of individual accounts, and the other known as the pro forma account.

Trustees' counsel reserve the right, if hereafter desired by them, to continue the cross-examination of the witness.

And the plaintiff's counsel reserves the right to recall the witness.

And further this deponent saith not.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this 27th day of January, 1886,

(Signed) CHAS. T. BARRY,
Special Master.

Memoranda Produced by Witness, B. U. Keyser, and Filed with His Deposition—Q. 11 and Answer.

NORFOLK, VA., December 19, 1885.

Charles T. Barry, Esq., Special Master, &c.:

SIR—In obedience to instructions, I reported on the 16th inst. for duty as an expert accountant, "to make a thorough examination and report of the books of Bain & Bro." in connection with the books of the Exchange National Bank of Norfolk.

To this end I visited the office of the trustees of Bain & Bro., in Portsmouth, to indicate such books, &c., as might be needed in the proposed examination.

To my surprise I found that the system of accounts employed in the business of Bain & Bro. was of the most elementary character and confined (since 1874), as I was informed by Mr. Robt. T. K. Bain, to personal entries of cash received and disbursed, to teller's blotters of deposits received and paid, and to ledger entries of various individual and companies, depositors with Bain & Bro.

This preliminary survey was conducted within the limits of a small vault packed with papers and crowded with persons.

It was deemed best at the time to request that the books of account be sent to the office of the Special Master in the case, where a more full and careful scrutiny could be made.

The said books were accordingly delivered at said office, and I have made a thorough inspection of them with the following result—

These books consist as follows:

1. General Ledger C, containing general accounts, bills payable, deposits, exchange, bills receivable, cash, brick yard, W. B. D. B. Co., Warehouse Co., real estate, Portsmouth city bonds, Portsmouth insurance stock, covering period July 1, 1869, to December 31, 1872, and individual accounts same period.

2. General Ledger D, containing general accounts, deposits, exchange, real estate, stocks, bonds, bills receivable, cash, covering period January 1, 1873, to December 31, 1874, and individual accounts same period.

3. General Ledger F (interest), containing general accounts, bills payable (one entry), night soil, wharf property, covering period December 20, 1875, to December 31, 1878, and individual accounts same period.

4. General Ledger E (2), containing individual accounts and general accounts, as follows: Blackstone National Bank, Boyleton National Bank, coupon account, guano account, Prospect farm and sundry bank accounts, covering period from January 1, 1875, to December 31, 1878.

5. General Ledger F (interest), containing general accounts, night soil,

wharf property, covering period January 1, 1879, to December 31, 1881, and individual accounts.

6. General Ledger F (2), containing general accounts, brick yard, coupon account, rent account, Blackstone National Bank, Lewis Johnston & Co., Farmers' Bank (Nansemond), Planters' and Mechanics' Bank, Richmond Banking and Insurance Co., and individual accounts, covering period January 1, 1879, to December 31, 1881.

7. Cash Tickler (or journal) I, May 1, 1872, to November 21, '73.

8. Cash Tickler (or journal) J, November 22, 1873, to July 30, '78.

9. Cash Tickler (or journal) K, August 1, 1878, to March 31, '83.

10. Cash Tickler (or journal) L, April 2, 1883, to April 2, '85.

11. Teller's, books of deposits received and paid out (23 books) from August 1, '72, to October 8, 1878.

It will be observed from the above list that there are, comparatively, no general accounts proper since December 31st, 1874, and that all accounts of a general character (such as interest, discount, cash, individual deposits, bills receivable, bills payable, re-discounts, real estate, investments, expense, taxes, profit and loss, capital stock &c., &c., which are indispensably necessary in any set of bankers' books) are conspicuously absent.

It is imperatively necessary that in my examination I shall have before me such accounts, and whilst I do not say that out of the materials on hand I cannot construct a partially intelligible set of accounts, yet I *do* say that the time and labor and expense involved would be very considerable and entirely beyond the scope of the duties contemplated by my appointment.

I am thus at the very threshold of enquiry confronted by a fatal want of compiled data, and in consequence of this insufficiency I shall be obliged to postpone further attempts to evolve intelligent results by examination of vague and chaotic memoranda.

In order to successfully prosecute the search as desired, I should require books showing, daily balances of cash, settlements of tellers, daily balances of individual deposits, balance sheets showing condition of business, accounts shewing each item of assset and liability from day to day, property accounts, &c., &c.

If such books and exhibits are in existence they should be produced before the Master, otherwise it is time wasted to grope for results through eleven years during which no general accounts are kept.

It is proper to remark in this connection that, finding no accounts of the enormous dealings of Bain & Bro. with the Exchange National Bank of Norfolk and the National Park Bank of New York, enquiry elicited the statement that all such accounts were confined to the pass books in ordinary use by depositors, and the stub in check books. This, in accounts aggregating millions annually, is barely credible.

Very respectfully,

B. U. KEYSER.

NORFOLK, VA., January 26, 1886.

Charles T. Barry, Esq., Special Master, &c.:

SIR—Since my report of the 19th inst. I have examined certain additional books and papers of Bain & Bro.'s furnished since that date to Special Master Charles T. Barry.

These comprise—

1. Stubs of drafts (checks), showing transactions of Bain & Bro. with Exchange National Bank from December 11, 1871, to April 2, 1885.
2. Pass books, covering about same period.
3. Cancelled checks.
4. Bills receivable books (2), containing lists of paper discounted by Bain & Bro. from May 28, 1872, to March 3, 1885.

These records are furnished in response to a call for books, &c., showing accounts of Bain & Bro. with the Exchange National Bank, and while such a system of accounts between an individual and his depository might hardly evade criticism for its crudeness, yet when such records are offered in disclosure of an account between banks involving transactions running up to millions in a month, the sincerity of the offer may well be questioned.

In addition to the insufficiency of these records, they could, under no circumstances, be held to exhibit the condition of the account, for the reason that they are inaccurately kept and cannot be relied on.

The stub books contain no reference to the following checks, nor have they been deducted in carrying forward balances:

December 27, 1884	$316,375 00
February 24, 1885	61,921 47
February 27, 1885	125,000 00
March 5, 1885	66,850 00
March 10, 1885	11,047 94
March 12, 1885	35,186 07
March 13, 1885	43,300 00
March 27, 1885	2,179 33
March 27, 1885	21,602 48

Nor do said books show the following deposits, as exhibited by the pass books:

October 18, 1884	$ 41,375 95
November 10, 1884	9,256 98
November 10, 1884	65,827 68
November 20, 1884	8,321 31
December 18, 1884	185,475 69
December 24, 1884	73,392 36
January 16, 1885	60,746 37
January 19, 1885	4,100 15
February 2, 1885	4,100 00
February 17, 1885	4,270 14
February 21, 1885	59,993 47
February 26, 1885	97,694 44
March 3, 1885	65,525 83
March 13, 1885	24 69

March 14, 1885	92,898 87
March 16, 1885	16 50
March 24, 1885	24 00
March 30, 1885	24 00
March 31, 1885	8,393 89
February 5, 1885	715 11
February 6, 1885	111 21
April 1, 1885	849 64

The firm of Bain & Bro. were in the habit of adding the deposits, deducting the checks drawn and carrying forward the balance of each page of the stub book.

The pass books, on the other hand, are inaccurate inasmuch as they contain no reference to the following deposits as exhibited in the stub books:

October 17th, 1884	$279,814 54
October 17th, 1884	5,780 55
January 20th, 1885	1,000 00
January 20th, 1885	1,000 00
January 20th, 1885	7,228 75
March 28th, 1885	23,000 00

Many checks, between October 15, 1884, and April 2, 1885, are missing from the bundles.

The books of bills receivable contain mere lists of paper discounted by Bain & Bro. They do not show whether the same were ever paid, or when paid—or even when discounted nor the disposition made of the proceeds—and are therefore utterly valueless.

I have therefore to state that the records last furnished do not throw any light upon the subject nor are they useful guides in the examination contemplated by the order of Court, and I renew my recommendation of the 19th ult. that the accounts therein called for be produced or accounted for.

Very respectfully,

B. U. KEYSER.

372 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Virginia,

vs.

R. T. K. BAIN, GEORGE M. BAIN, Jr., and JAMES G. BAIN, Surviving Partners of Themselves and Thomas A. Bain, Deceased, late Bankers and Partners Under the Firm Name and Style of Bain & Bro., and as Constituting the Late Firm of Bain & Bro., Wm. W. Old, John T. Griffin, and John B. Jenkins, Trustees, and Others.

Exceptions taken by the said Wm. W. Old, John T. Griffin, and John B. Jenkins, trustees, defendants in the above cause, to the report made therein by Chas. T. Barry, special master, under an order in said cause, dated November 11th, 1885, which report bears date and was filed April 10th, 1886.

The said Wm. W. Old, John T. Griffin, and John B. Jenkins, trustees, except to the said report upon the following grounds and for the following reasons:

I. For that said report was settled and filed by the said special master without the knowledge of these defendants or their counsel, and no copy or draft thereof was ever seen by them, or shown
373 to them by said master, but that the same was settled and filed without notice, and without opportunity to them of examining said report and objecting thereto, as otherwise they would have done.

II. For that the special master in his said report, on page IX thereof of the printed book, marked as filed by plaintiff, reports the purchases of real estate by Bain & Bro., and the cost thereof, as appearing from the exhibit filed by W. W. Old with his deposition, Q. 28, as amounting to a total of $141,378.03, the same including "all such estate, firm and individual;" whereas the cost of the said real estate appearing from the said exhibit amounts to a total of $179,142.09, if we include the first item of city property, on page one thereof, bought in 1860, $325; the first item of county property, on page two thereof, bought in 1859, $3,000, and three items of $1,043 each, on page four, being the interest in real estate inherited from their father; and, if we exclude the said items, the cost of said real estate will be $172,688.09; but said exhibit is not printed with the testimony and is not in said book.

III. For that the said special master in his said report, on page nine thereof, and immediately following the subject-matter of the second exception, uses the following language: "The trustees assess the value thereof as follows, to wit;" the context of which taken by itself would mean the value of the real estate just before mentioned and referred to, although the detailed assessment following, which aggregates $419,369.90, shows how much is assessed upon the said real estate and how much upon the other trust property, in-

cluding the Wallace estate, which Wallace real estate was not embraced in the aforesaid aggregation of $179,142.09, the Wallace property being acquired after April 2nd, 1885, and being embraced in the said exhibit filed by Mr. Old, not as a part of the real estate purchased by Bain & Bro. before their failure, the dates of whose
374 purchase are all given in detail to aid the object of this reference, but acquired afterwards under the Wallace deed. It is proper to say here that the said detailed assessment of trustees, as given by the special master, shows upon examination that the value of the said real estate referred to in the said second exception is, as estimated by the said trustees, $189,376.75, the purchase price of the same having been, as before stated, $179,142.09, or $172,688.09, excluding the several items referred to in said first exception.

IV. For that the said special master in his said report, on page X thereof, uses the following language: "The special master finds this as the estimated value of the real estate, but cannot rely upon the figures given, as there is no way to ascertain the offsets and reductions which are stated as existing to the various items given in the 'list of notes and overdrafts' filed by the trustees."

The said trustees, by their counsel, deny that there is no way of ascertaining the amount of the offsets and reductions referred to; the said trustees had informed themselves with much care as to the said offsets and reductions in the management of their trust, and had availed themselves of the information so acquired in their estimate of the property in question, and would have been glad to furnish the details of that information, if the same had been inquired for, but no such inquiry was made by the special master.

V. For that the said special master in his said report, on page X thereof, uses the following language: "The difficulty of ascertaining any facts in regard to this matter is apparent from a glance at the mode of keeping the accounts between Bain & Bro. and the bank, no record except the stub-books and return checks, as before stated, being kept of the transactions, either in real or personal estate. Deeds for the real estate of the firm were nearly always taken in the name of R. T. K. Bain, and it is here noted that information
375 touching nearly all the investments of the firm is derivable, not from the books of Bain & Bro., but from the memory alone of R. T. K. Bain, in whose name the great bulk of the assets stand, and by whom they were controlled. In nearly every instance stocks and other securities, though issued to an individual member, are said by him to belong to the firm."

It is true that there was no complete real estate or investment account on the books of Bain & Bro., and that said books were incompletely kept; but the account of Bain & Bro. with the Exchange National Bank was kept on the books of the said bank in detail, showing all the checks drawn on the said bank, and all of Bain & Bro.'s checks, whether on said bank or on themselves, were under the inspection of the special master and the experts and the plaintiff's counsel, so that it could be readily seen whether checks had

been drawn on the bank in payment of any property, or whether any checks on themselves had been deposited by the holders in Norfolk banks and had come through the clearing house in Norfolk, and in that way been paid by the Exchange National Bank, in which latter case they would have been stamped as paid by the Exchange National Bank. Again, the bulk of the trust property is real estate, and the special master and the experts and counsel had before them the inventory filed by the trustees in the cause giving a detailed statement of each piece, as well as the deeds, and a further statement filed by Mr. Old, one of the trustees, as Exhibit X, with his answer to question 28, of his deposition, setting out in a clear and succinct form each piece of real estate, and the date of its purchase, and the amount of the purchase-money.

VI. For that the said special master in his said report, on page XI thereof, alleges that the indebtedness of Wallace & Son since 1877 was carried for them by Bain & Bro. without interest, and that the investments made by Wallace & Son in real and personal estate were considered by R. T. K. Bain as
376 belonging to Bain & Bro. The trustees, by their counsel, allege that there is no ground for stating that the said indebtedness from the said date was carried without interest, beyond the fact that the said account was not written up on Bain & Bro.'s books and the said interest had not been charged up, but this was the case with many other accounts besides that of Wallace & Son, and upon which interest was due and has been charged by the trustees since taking possession; and they further allege that there is no warrant or authority for the statement that Wallace & Son's investments in real and personal estate were considered by R. T. K. Bain as belonging to Bain & Bro., and — no evidence to justify or sustain any such statement.

VII. For that the said special master in his report, on page XI thereof, uses the following language: "That the funds of the Exchange National Bank obtained by Bain & Bro. went to aid the business of Wallace & Son, there is no sort of doubt," the evidence before the said special master being wholly insufficient to sustain any such conclusion.

But the said trustees, by their counsel, do here allege that to say that the funds of the Exchange National Bank went to aid the business of Wallace & Son, without denoting to what extent or at what time or what business of Wallace & Son, or without tracing some such funds into some property of Wallace & Son in the hands of the trustees, is irrelevant and improper and outside of the purposes and objects of the reference to the said special master. While the said special master is not called upon by the said decree of November 11th, 1885, to pass upon the question of knowledge or notice to the trustees, such question not being submitted to him, it is nevertheless clear, from the express language of the said decree, that the object of the said reference to him was to trace any moneys obtained from the Exchange National Bank into any of the property held by the said trustees, and to identify the money and the property.

377 Such was the scope and object of the said decree and of the amended bill, upon which the same was based.

VIII. For that the said special master in his said report, on pages XI and XII thereof, uses the following language: "The trust subject is largely composed of this property (referring to the Wallace property), but the inventory makes no appraisement of it, nor have I any means of ascertaining the value of the real estate conveyed by Wallace & Son."

The valuation placed by Wallace & Son on their property at the time of their deed to Bain & Bro. is given in the pleadings, both in the answer of Bain & Bro. and in the answer of Wallace & Son. The amounts opposite the several pieces were not extended by the trustees in their inventory, filed at an early stage in this cause, because they were not able then to do so of their own knowledge. The said inventory did not purport to be a complete appraisement, and the value of other property besides the Wallace property was not extended on said inventory; but all of the said trustees in their depositions before the special master testified as to the value of the said property, and its valuation is given on page IX of said special master's report; and the said trustees, by their counsel, submit that the said special master had as ample means of ascertaining the value of the said real estate as it is possible to have without an actual sale. The trustees stood ready to give to the said special master any and all detailed information in respect to the said real estate, but it did not please the said special master to make such inquiry.

IX. For that the said special master in his said report, on page XII thereof, uses the following language: "But I find conclusive evidence of the purchase by Bain & Bro., and the individuals composing that firm, with funds obtained from the Exchange National Bank, while they were respectively occupying the official relations to said bank above mentioned, of the following parcels of real
378 and personal estate now in the hands of the trustees and claimed by them, the dates of purchase, and the amounts set opposite, as follows:

Real Estate.

Inventory No. 22, bought May, 1876	$650 00
" " 50, " Sept., 1881	500 00
" " 58, " Ap'l, 1884	1,137 45
" Nos. 65, 66, and 67, bought Aug., 1881, and October, 1882, $768.34 + $1,865.16	2,633 30

Colorado Mines.

Boomerang, bought Aug. 30, '84	16,333 00
Laura Dunmore, bought Aug. 4, '84	5,000 00
	$26,253 95

Personalty.

Dismal Swamp Canal bond, bought Dec., 1880	2,100 00
Seaboard & R. R. R. Co.'s stock, 1 share, bought about '79	90 00
Ocean V. R. R. & Hotel Co.'s stock, 122 shares, bought Oct., 1880	6,100 00
Chesapeake & Idaho Gold and Silver Mining Co.'s stock, 625 shares, bought after 1881; date not given	7,812 50
Guano, "Ex. Mt. Edgecomb," paid for by the Ex. Nat'l Bank, Feb. 15, 1884, $59,725.97; part thereof on hand April 6th, 1885, and other part in open accounts due for sales thereof; amount now traced	15,034 51
Norfolk & Ouray Mining Co.'s stock, 6,114 shares, whereof the trustees hold 3,602 shares, the purchase price being $25.00 per share	90,050 00
Personal estate of James G. Bain	1,931 25
	149,372 21

The special master here undertakes to trace and identify property. The counsel for the trustees desire first to call attention
379 to the fact that the said special master has stated the property, and given what he understands to be the purchase price thereof. It is plain that, for the purposes of this reference and in order to ascertain the value of any property in the hands of the trustees purchased with money obtained from the Exchange National Bank, it is the present or actual value of such property which should be considered and not the purchase price thereof.

The item of Norfolk and Ouray Mining Company stock, placed at $90,050, and constituting far more than one-half of the whole property alleged to be traced, is absolutely worthless, as shown by the testimony (W. W. Old's deposition, answer to question 15, page 199 of printed testimony, and Exhibit X, with his answer to question 28, not printed in the testimony).

But it is proper to state here that the testimony does not show that any such amount was obtained from the bank and expended in said stock as is mentioned by said special master. The testimony bearing upon this point is H. D. Bulkley's answer to the 28th question, p. 144, and Geo. M. Bain, Jr.'s answers to questions 156, 157, 158, 159, pages 100 and 101. And it is proper also to state here that the entire assessment of all corporation stocks and bonds of every kind in the hands of the trustees is, as shown by the said report of the special master, page IX, $14,000.

The item of Chesapeake & Idaho Gold and Silver Mining Company stock, placed at $7,812.50, is absolutely worthless, as shown by the testimony. (W. W. Old's deposition, answer to question 15, page 199, and Exhibit X, with his answer to question 28.)

The two items of Colorado mines, the "Boomerang" and "Laura Dunmore," aggregating $21,333, are worth only $1,000, as shown
380 by the testimony (W. W. Old's deposition, answer to question 30, page 205, and cross-question 89, page 229); it is further shown

by the evidence that this Colorado mining property is the subject of a suit brought by the plaintiff, Wm. H. Peters, receiver, in the circuit court of the United States for the district of Colorado, and now pending for the purpose of recovering the same, and that the $1,000 above referred to is by agreement of counsel to be sent there to await the result of that suit. (W. W. Old's deposition, answer to cross-question 93, page 230, and question 1, page 236, on re-examination.) The said $1,000 was realized from a sale of the Laura Dunmore interest, and the Bomerang interest is regarded as valueless.

It further appears from the testimony that the Dismal Swamp Canal Company bond, placed at $2,100, is worth only $975. (W. W. Old's deposition, answer to question 15, page 199, and Exhibit X, with his answer to question 28, not printed in the testimony.)

It further appears from the testimony that no guano in kind of the cargo of the "Mt. Edgecomb" came into the hands of the trustees (W. W. Old's deposition, answer to question 17, page 200), and that the amount of open accounts or bills for the sales of such guano coming into the trustees' hands was $12,323.47, including uncollected and worthless bills, but subject to offsets amounting to $2,383.70, making the actual amount of said bills $9,939.77, of which $6,159.98 has been paid to the trustees, and $3,779.99 are in their hands unpaid. (The evidence on this subject is H. D. Bulkley's deposition, answer to question 27, page 143; W. W. Old's deposition, answer to question 18, page 201; and Geo. R. Atkinson, Jr.'s deposition, answer to question 88, pages 122, '3.)

Making the above corrections to the said statement of the special master, and we find the amount of $149,372.21 reduced to $20,177.18, in manner and form as follows:

381 *Real Estate.*

Inventory No. 22, bo't May, 1876			$650 00
" 50, " Sept., 1881			500 00
" 58, " Ap'l, 1884			1,137 45
" 65, 66, 67, bo't Aug., 1881	$768.34		
" " Oct., 1882	1,865.16		
			2,633 50

Colorado Mines.

Boomerang Laura Dunmore	worth $1,000, but sent to Colorado to await result of suit there	
		$4,920 95

Personalty.

Dismal Swamp Canal Co. bond, bought Dec., 1880	$975 00
Seaboard & Roanoke R. R. stock, about 1879	90 00
Ocean V. R. R. & H. Co.'s stock, 122 shares, Oct., '80 (as alleged by special master)	6,100 00
Ches. & I. G. & S. J. M. Co.'s stock, 625 shares, after 1881	00 00
Guano bills or accounts of cargo [of the] Mt. Edgecomb	6,159 98
Norfolk & Ouray Mining Company stock	00 00
Personal estate of James G. Bain	1,931 25
	$20,177 18

Of the items making up the above amount of $20,177.18 all are given by R. T. K. Bain down to and including the item of Ocean View R. R. & Hotel Company stock; and he testifies that of said items only one, viz., the item of $500, was paid for by check on the Exchange National Bank, the others being by checks on Bain & Bro., but deposited by the holders in Norfolk banks for collection, and thus coming through the clearing house in Norfolk, and being taken up by the Exchange National Bank.

382 Again, it is clear that no item so purchased prior to July 13th, 1880 (even if any items since then can be so regarded), should be regarded as purchased with the money of the Exchange National Bank, as the expert Bulkley testifies (answer to question 24, page 140) that Bain & Bro. had a balance to their credit as late as that date; and it is proper also to say that the statement in the said report, on page XIII, that the checks taken up by the Exchange National Bank for the payment of said pieces of real estate were carried in the paying teller's cash, "where the debit balance of Bain & Bro. was continuously large from the 18th July, 1880, up to the failure," is not supported by the testimony, and is not correct. See Henry S. Herman's deposition, answers to question 3, page 173, and to cross-question 1, page 175, and Exhibit X, filed with his deposition, but not printed in the testimony.

(In treating this subject the trustees' counsel leave out of consideration now the deposits made by Bain & Bro. in the Exchange National Bank of the large sums of cash (not discounts or rediscounts) amounting to an average of more than one million dollars ($1,000,000) annually (as shown by their pass books and by the testimony), and the effect of such deposits upon the question of tracing the money of the said bank.)

Leaving out therefore the item of $650 of May, 1876, and of $90 of 1879, and of Ocean View Railroad and Hotel Company stock, $6,100 (as to the time of purchase of which latter the statement of the said report as to its purchase is erroneous, the testimony being that it was purchased in 1879 or 1880, and not October, 1880, as stated by the said special master. See R. T. K. Bain's deposition, answer to question 519, page 73); and it is apparent that the said sum of $20,177.18 should be reduced by at least the further amount of $6,840, so that if any of the money of the said bank is to be considered as traced it cannot exceed the sum of $13,337.18.

383 X. For that the said special master in his said report on pages XII and XIII thereof uses the following language: "A similar purchase of a cargo of guano to that mentioned above was made with the funds of the Exchange National Bank on the 18th day of January, 1881, being cargo per bark 'James Bain,' and the sum of $50,511.70 of the bank's funds were used to make the purchase, the draft therefor being treated in the same manner as that for the cargo 'Mt. Edgecomb.'"

It is nowhere pretended that any part of this cargo bought in 1881, or any bills for the sale of any part of it, came into the trustees' hands. The statement is therefore irrelevant and improper.

It may be allowed to the trustees by their counsel to state here that it is significant that the expert H. D. Bulkley, whose examination has been so minute as to trace certain bills or accounts for guano, a part of the cargo of the ship Mt. Edgecomb, has been unable to trace anything else whatsoever (except certain Norfolk & Ouray Mining Company stock, hereinbefore referred to, which is absolutely worthless).

XI. For that the said special master in his said report, after setting out on pages XIII and XIV thereof that he is called on to report: "Fourthly. At what time or times and under what circumstances and upon what securities said moneys or funds of said Exchange National Bank, with which said property or any part thereof may have been so purchased or acquired, were obtained" enters upon and reports to the court on pages XIV, XV, XVI, XVII, XVIII, and XIX, matters wholly irrelevant to the object and purpose and to the terms of the said decree.

It is clear that the said fourth subdivision calls for information as to those moneys of the bank which may have been traced into property embraced in the deed of trust. The object of the
384 reference and of the amended bill was to trace moneys obtained from the bank into property held by the trustees, and to show how such moneys were obtained from the bank. But the said special master has undertaken to devote pages of his report to a statement and computation of the indebtedness of Bain & Bro. to the Exchange National Bank, and how the same was incurred, having no application whatever to the subject-matter before him.

He also has in his said statement of the indebtedness embraced the assessments made upon Bain & Bro. by the comptroller for the stock held by them in the said bank. He has also included the whole of the unpaid rediscounted paper, much of which is good and will be paid by the makers thereof. The indebtedness of Bain & Bro. to the Exchange National Bank is set out in the bills filed in this cause, and has been admitted in the answers and is now admitted; but the amount of said indebtedness and the mode in which the same was incurred have nothing to do with the subject-matter of this reference or with the merits of this case.

XII. For that the said special master in his said report, on page XIV thereof, uses the following language: "And the said R. T. K. Bain received back their said notes representing that amount, to wit, $570,000, on that day, upon his agreement with the counsel for the bank that he should make no deed giving preference against the said bank;" and for that the said special master, in his said report, on page XX thereof, uses the following language: "It is also proved that R. T. K. Bain, who executed that agreement for Bain & Bro., was informed by counsel for the bank that said agreement would not be accepted unless he agreed not to make any assignment deed giving preferences against the bank. He accordingly made that promise and the agreement was delivered, thus obtaining from
385 the bank the release of Bain & Bro.'s notes and other debts mentioned in the plaintiff's bill;" and on page XXI the following language: "The agreement of R. T. K. Bain, made as afore-

said at the time of obtaining from the bank the notes aforesaid on March 31st, 1885, was discussed between the respective counsel for some days before the assignment was made to Messrs. Old and others, trustees. Their views as to its legal effect are immaterial and irrelevant. The agreement being proved, its legal effect and the obligations of the parties having notice thereof are to be determined by the court."

The said trustees, by their counsel, deny that there was any agreement made by or between the said R. T. K. Bain and the counsel for the bank, as stated by the said special master. There was a parole promise made by the said R. T. K. Bain, which was without consideration, and was for that and other reasons invalid and of no binding effect, and was so treated by counsel for the bank. It was of no avail whatever to prevent or in any manner to affect the deed of assignment of Bain & Bro.

And the said trustees, by their counsel, except on the further ground that the testimony of A. P. Thom, the said counsel for the bank, in respect to the said parole promise (which testimony was excepted to on the taking of his deposition), was inadmissible, and could not, therefore, be legally made the basis of the said statements by the said special master.

And the said trustees, by their counsel, except on the further ground that the said statements by the said special master are wholly irrelevant to the subject-matter of the reference to him and the object and intent and purpose thereof.

XIII. For that whereas the said special master in his said report, on page XXI thereof, uses the following language: "The
386 trustees say the amount shown by the books of Bain & Bro. (referring to the amount due to the depositors) is about $889,000, exclusive of the deposit of the Richmond Cedar Works, which has been paid in full by check dated April 3rd, 1885, drawn since the failure and allowed by the trustees after they took possession."

The check of the Richmond Cedar Works on Bain & Bro. for their deposit, $31,885.71, was allowed by Bain & Bro. prior to their deed of assignment, and was allowed in the interest of the Exchange National Bank, and with the view and for the purpose of benefiting that bank, which held the notes of the Richmond Cedar Works for $140,000, and owned besides an interest in said works. It is unnecessary to say more; the pleadings and the testimony show conclusively what the transaction was. Reference is here specially made to the answers of W. W. Old to questions 3 and 4, pages 191 '2 '3 '4 '5, and to cross-questions 8, 9, 12, and 109, pages 210 '11 '12 and 234 '5 of his testimony, and to the exhibit filed by him with his answer to cross-question 109, which is not printed with the testimony.

XIV. For that the said special master in his said report, on page XXI thereof, uses the following language: "The actual amount of deposits, for which claims have been proved before them, was stated by John B. Jenkins, trustee, as $650,000, and subsequently stated by him and W. W. Old, Esq., another one of the trustees, to be $770,000, and this latter sum I must regard as the probable amount of their liability to depositors, the books being altogether unreliable."

In regard to the amount of deposits proved, the testimony is as follows (John B. Jenkin's deposition, page 245):

Cross-question 19. What is the total amount proved before the rustees of Bain & Bro., and claimed of them by depositors?

A. The claims of depositors, that have been proved and for
387 which the trustees have issued certificates of indebtedness, amount to $770,710.87.

Cross-question 20. That is the total for which the trustees have issued certificates, is it?

A. The delay occasioned by the keeping of the books of Bain & Bro. so long has prevented a number of depositors, who have presented their pass-books to the trustees, from getting certificates of deposit, and thereby proving their claims; $770,710.87 is the amount of certificates we have issued at present.

And in regard to the entire amount of deposits, the testimony is equally clear. Mr. Old, in his answer to question 33 of his deposition, page 206, says: "I knew that they (Bain & Bro.) did by far the largest business of the city of Portsmouth, but I had no idea, until I was informed by Mr. Robert Bain himself, of the extent of his indebtedness to his depositors. He informed me that it was about $900,000, and since I have taken charge of the books I have found that, as they stated, on the 2nd of April, 1885, the amount to the credit of his depositors was, in round numbers, $890,000, after deducting the amount, which was due to the Richmond Cedar Works, of $31,885.71. This amount has been reduced somewhat by set-offs, but I estimate that, allowing all set-offs, the amount found due to his depositors will be about $860,000."

And there is nothing in any part of the testimony to diminish the amount of the deposits below what has been stated by Mr. Old, whose statement is made from the books as well as from actual knowledge and information obtained.

Again: Mr. W. G. Maupin, who was the teller of Bain & Bro., and who was clerk for the trustees afterwards, testifies in his answer
388 to question 58, page 113, and cross-question 1, page 113, that the amount due to the depositors of Bain & Bro. was about $889,000.

Mr. R. T. K. Bain, not testifying from the books, said in answer to cross-question 2 of his deposition, page 83, as follows:

Q. State what, or about what, was the amount due by the firm to its depositors at the time of its failure?

A. About $900,000, not including the deposit due to the Richmond Cedar Works.

It is submitted that the testimony upon this point can admit of no doubt; nor is there any doubt as to what the testimony is as to the amount secured by the deed, nor as to the amount secured to the Exchange National Bank by the deed, (W. W. Old's testimony, page 208), though the latter is not deemed of sufficient bearing upon the subject to call for an exception to the special master's report in that regard.

XV. And the said trustees, by their counsel, except to the recapitulation of the said special master at the close of his said report,

on pages XXII and XXIII thereof, and to each and every one of the four paragraphs thereof, for the reasons and upon the grounds hereinbefore specifically set out; and the said trustees specially except to the third paragraph thereof, and to that portion of the same stating that portions of property purchased by Bain & Bro. with moneys obtained from the Exchange National Bank "are in the hands of the trustees, claimed under the deed of trust, at least to the extent of assets representing $149,372.21."

It is not believed that the special master intends to convey the impression that property of any such value, purchased by Bain & Bro. with funds obtained from the Exchange National Bank, is in the hands of the trustees. Such a contention would
389 be not only wholly without support, but directly opposed to the facts and to the testimony; but the language used by the said special master makes it proper to call the attention of the court again to the facts hereinbefore specifically set out in exception IX, and the statements and figures therein contained, all of which are hereby made a part of this exception as if the same were here again repeated. The worthlessness of the mining stocks and interests constituting, it might be said, almost the whole of the amount mentioned by the said special master has been proved and is not denied, and cannot be denied, and the real value of the whole property traced (if any such can be claimed to have been traced) is, as before shown, about $13,337.18.

XVI. And the said trustees, by their counsel, except to every matter and statement in said report shown upon its face to be irrelevant to the inquiries directed by the said decree of November 11th, 1885.

Norfolk, Va., May 10th, 1886.

RICHARD WALKE,
LEGH R. PAGE,
JAMES ALFRED JONES,
Counsel for the Trustees.

NOTE.—The counsel for the trustees call attention to the fact that the printed book, marked as filed by the plaintiff, purporting to contain copy of the decree of November 11th, 1885, of the special master's report and of the testimony, does not contain the exhibits filed with the testimony, some of which are important and of special bearing upon the case.

390 EXCHANGE NATIONAL BANK,
NORFOLK, VA., *February 28th*, 1885.

Hon. Henry W. Cannon, Comptroller of the Currency, Washington, D. C.

DEAR SIR: The corporate existence of this bank will expire on the 25th of April, 1885. You will please inform me how to proceed to have the charter renewed or extended, and oblige,

Yours, respectfully,

JOHN B. WHITEHEAD, *Pres't.*

391 EXCHANGE NATIONAL BANK,
NORFOLK, VA., *March* 4, 1885.

Hon. H. W. Cannon, Comptroller of the Currency, Washington, D. C.

SIR: Yours of the 2nd instant, with enclosure relative to the renewal of the charter of this bank, is rec'd. I will comply with the requirements of the law as soon as I can get a power of attorney from California, the residence of one of the largest stockholders.

Yours, respectfully,

JOHN B. WHITEHEAD, *Pt.*

392 TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *March 16th*, 1885.

GENTLEMEN: I have received a preliminary report of an examination of your bank made on the 12th inst., and regret to find that the bank is in a condition at once perilous and in flagrant violation of law. The condition of the lawful money reserve of the bank is shown by the report to have been as follows:

Aggregate reserve required		$463,562 32
" " held		315,975 47
" " short		$147,586 85
Home " required		183,624 93
" " held		89,990
" " short		93,634 93

The following excessive loans are reported to have been made by the bank:

Bain & Bro.	858,816 07
J. B. Whitehead & firm	210,330 89
Reynolds Bros.	184,170 78
Wallace & Son	134,261 61
Etheredge & Brooks	67,850 16
W. H. Smith & Son	49,000

393 The indebtedness of Bain & Bro. is probably understated, as some of the partners are also borrowers. The examiner says that only $88,700 of the firm's indebtedness, payable on demand, is secured by collaterals, and, of the remainder, $625,000, payable on time, has no security, nor has the remaining $145,116.07, due on open account.

These loans are in flagrant violation of section 5200 U. S. Revised Statutes, to which attention is called, and of your oaths as directors, wherein you swore neither to violate, nor permit to be violated, any of the provisions of the law.

Overdrafts, mainly unsecured, amounting to $204,671.15 are re-

ported, which the examiner says is a chronic state of affairs, and he estimates twenty-five per cent. of the overdrafts as worthless.

The over-due paper reported amounts to $237,029.69, a large part of which has been standing for a number of years; and it is said that upwards of $52,000 of additional past-due paper is carried in the cash items. I notice that the president has an over-due note
394 running back to 1872.

The examiner says that he discovered the bank to be liable for $100,000 on account of money borrowed from A. Brown & Sons, of Baltimore, on bills payable, and that there is no account on the ledger of this transaction. He also says that a comparatively small portion of the time loans of the bank are secured by collaterals, and that interest is paid upon nearly all of the deposits, the amount so paid for the first two months of this year being nearly $16,000, or, say, at the rate of $100,000 a year. He states further that the minute-book discloses the fact that the directors meet but a few times in each year, committing by resolution the entire management of the bank to an executive committee, composed of the president, cashier, and assistant cashier, which committee makes no report to the board; that the president and cashier are connected in business, and that their firms are enormous borrowers from the bank.

I have thus briefly laid before you the principal violations of law and other irregularities shown by the report, and which
395 clearly demonstrate that the affairs of the bank are in a deplorable condition, and one which may result in overwhelming disaster at any time.

It may be, however, that you can succeed in placing the affairs of the bank on a satisfactory basis at an early day, and, while I am willing to afford you a reasonable opportunity for doing so, you are particularly notified that there must be no delay whatever in bringing about this result, if it be one that can be accomplished.

You are instructed to notify me immediately what course you propose to take in the premises, and also to definitely inform me at once what steps are to be taken. You must face the alternative of immediately placing the affairs of the bank in a satisfactory condition in all respects, or place the bank in voluntary liquidation at once, after taking such steps as are necessary to protect depositors, and in default of your doing one thing or the other it will be my duty to have a receiver appointed. Any reply that you may make to this letter must be made over your official signatures.

Very respectfully,

H. W. CANNON,
Comptroller.

To the directors of "The Exchange National Bank," Norfolk, Va.

396 STATE OF VIRGINIA, *Corporation of the City of Norfolk*, } *To wit:*

Before me, T. S. Garnett, Jr., a notary public for the corporation aforesaid, in the State of Virginia, this day personally appeared William H. Peters, and, being by me first duly sworn, made oath

that he is the receiver of the Exchange National Bank of Norfolk, as appears by a certified copy of his commission bearing date the 9th day of April, 1885, hereto annexed, issued to him by H. W. Cannon, Comptroller of the Currency of the United States, and as receiver as aforesaid he is plaintiff in the suit against R. T. K. Bain, George M. Bain, Jr., and James G. Bain, late partners doing business as bankers under the firm name and style of Bain & Bro., and others, defendants, pending in the circuit court of the United States for the eastern district of Virginia, at Norfolk, in said district.

That upon taking charge as receiver of the books, records, and papers of the Exchange National Bank of Norfolk, this affiant ascertained that the said firm was indebted to the said bank as
397 makers of certain notes, each for the sum of twenty-five thousand ($25,000) dollars, aggregating the sum of three hundred and twenty-five thousand ($325,000) dollars. A list of said notes now held by this affiant as receiver is hereto annexed. And in addition to the said sum of $325,000 the said Bain & Bro. are liable to the said Exchange National Bank of Norfolk as endorsers upon a further large quantity of notes made by George M. Bain, Jr., Wallace & Son, and others, a list of which notes held by the receiver is hereto annexed, amounting in the aggregate to the sum of five hundred and eighty-one thousand nine hundred and seventy-one $\frac{49}{100}$ dollars, and the further sum of $11,280.50 has since been ascertained as due.

And the said Bain & Bro. are further indebted to the said bank in the sum of two hundred and eleven dollars by due bills, and the said bank also holds checks and drafts against the said Bain & Bro. in the further sum of three thousand four hundred and seven $\frac{68}{100}$ dollars.

And this affiant further maketh oath that the said Bain & Bro., and each individual member of said firm, are liable as
398 stockholders of said bank to the extent of the par value of the stock of said bank, whereof they are holders; and that since the filing of the bill in the above-mentioned suit this affiant has caused to be made a correct list of the stockholders of said bank, as far as it is possible to ascertain from the books thereof, which said list is hereto annexed, and from which it appears that the following-named defendants in the said suit are stockholders of the said bank in the number of shares set opposite their names respectively, to wit:

Bain & Bro.	582 shares.
George M. Bain, Jr.	232 "
George M. Bain, Jr. (with J. B. Whitehead)	100 "
James G. Bain	91 "
R. T. K. Bain	91 "
Thomas A. Bain's estate	91 "
Aggregating the number of	1,187 shares.

That on the 17th day of April, 1885, H. W. Cannon, Comptroller of the Currency, by his written direction of that date, ordered the

said William H. Peters to take the necessary proceedings, by suit or otherwise, to enforce the full extent of the individual liability of the said shareholders to the amount of one hundred per
399 centum of the par value of the shares of said bank; that accordingly the said William H. Peters, receiver, sent out his notices demanding payment of the said stock liability from each and every one of the said shareholders. And for the recovery of the said liability of the said Bain & Bro., individually and as a firm, the Comptroller of the Currency has directed the receiver to institute the said suit and to set aside therein the deed of trust of Bain & Bro. to Jenkins, Griffin & Old, trustees, as in the bill and proceedings in said suit is fully set forth.

WM. H. PETERS.

Subscribed and sworn to before me this 11th day of May, 1885. Witness my hand and official seal.

[SEAL.] T. S. GARNETT, JR.,
Notary Public.

400 TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *April 17th*, 1885.

In the Matter of "THE EXCHANGE NATIONAL BANK OF NORFOLK," Norfolk, Virginia.

To all whom it may concern: This is to certify that I have taken an accounting of the condition of the estate of "The Exchange National Bank of Norfolk," Norfolk, Virginia, aforesaid, and of its assets and liabilities, and I do find and determine upon data satisfactory to me that, in order to provide the money necessary to pay the debts of said association it is necessary now to enforce to the extent hereinafter mentioned the individual liability of the shareholders of said association, provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and by section 5151 of the Revised Statutes of the United States, approved June 22, 1874, and to that end, and in pursuance of the powers vested in me by the said acts, I have made and hereby order and make an assessment or requisition upon the shareholders of said association or bank, and each and every one of them, equally and ratably to the amount of one hundred per centum of the par value of the shares of the capital stock in the said association held or owned by them respectively at the time of its failure or suspension, and I direct William H. Peters, the receiver heretofore appointed of the said association, to take the necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereunto set my hand and caused my seal of office to be affixed to these presents at the city of Washington, in the District of Columbia, this 17th day of April, A. D. 1885.

[L. S.] H. W. CANNON,
Comptroller of the Currency.

401 *List of the Shareholders of the Exchange National Bank, Norfolk, Va.*

Names of stockholders.	No. of shares.	Residence.
Allyn, Joseph T.	10	Norfolk, Va.
Bain & Bro.	582	Portsmouth, Va.
Bain, Geo. M., Jr.	232	"
Bain, Thos. A.	91	"
Bain, Jas. G.	91	"
Bain, R. T. K.	91	"
Bain, Thos. Alex.	10	"
Bain, Geo. McK.	5	"
Bell, Mary E.	20	Norfolk, Va.
Duncan, W. W.	10	Spartanburg, S. C.
Foster, S. Gibson	35	New York.
James, John	10	Norfolk, Va.
Jenkins, C. E.	50	" "
Lublin & Steiner	20	
McDonald, R. H.	1,200	San Francisco, Cal.
McDonald, R. H., Jr.	1	"
Moore, Camilla A.	15	Norfolk, Va.
O'Neill, Peter	15	
O'Neill, Charlotte	5	
Parrish, Alice T.	5	Portsmouth, Va.
Stevens, S. A., & Co.	5	Norfolk, Va.
Toomer, Jas. H.	15	Portsmouth, Va.
Whitehead, Jno. B.	262	Norfolk, Va.
Whitehead & Bain	100	Norfolk & Portsmouth, Va.
Whitehead, H. C.	10	Norfolk, Va.
Wilson, D. B.	100	Fort Worth, Texas.
Windsor, Orlando	10	Norfolk, Va.

[Across the face in red ink:] Demand made on shareholders designated in this list by circular letter dated April 18th, 1885, sent to each shareholder by registered letter mailed April 22, 1885.

402 The undersigned, Benjamin W. Keyser, being first duly sworn, deposes and says:

That he is now, and has been since the year 1874, an examiner of national banks, under the direction of the Comptroller of the Currency of the United States.

That by direction of the said Comptroller of the Currency he made on March 12th, 1885, an examination into the condition of the Exchange National Bank of Norfolk.

That such examination developed the fact that said bank was hopelessly insolvent, mainly by reason and on account of the worthlessness of certain assets, notably promissory notes held and owned by said bank, and which in the opinion of deponent were not collectible.

That among said indebtedness to said bank the promissory notes of Messrs Bain & Bro., of Portsmouth, Va., figured largely, aggregat-

ing the enormous sum of $625,000, without any apparent security, and a further indebtedness of said Bain & Bro. on open account of some $145,000, besides endorsements of the promissory notes of other parties to an amount of upward of $200,000.

That upon ascertaining these facts he proceeded immediately to Washington, D. C., and laid them before the Comptroller of the Currency, who thereupon communicated them to the officers
403 of said bank, and insisted that the aforesaid valueless assets be secured in some way by satisfactory collaterals, or that his duty would impel him to appoint a receiver.

That the officers of said bank promised and undertook to take steps for restoring the solvency of the bank, and to that end, as deponent is informed and believes, called a meeting of capitalists of Norfolk to devise ways and means for the fulfillment of said promise and undertaking.

That said meeting was held on the evening of March 31, 1885, at the dwelling-house of Mr. James G. Bain in Portsmouth, Va.

That for divers reasons not known to deponent said efforts to resuscitate the solvency of said bank failed, and on the morning of April 2, 1885, the doors of said bank were closed to business, and insolvency practically ensued.

That this deponent, under instructions from the Comptroller of the Currency, came to Norfolk on the 3rd day of April, 1885, and, in conjunction with Mr. James C. Brown, of Washington, D. C., took charge of the bank and its assets, pending an examination of its affairs for the purpose of determining the question of insolvency, and that upon the report of said Brown and this deponent
404 the said Comptroller of the Currency declared the said bank insolvent, and under date of the 9th of April, 1885, appointed Mr. Wm. H. Peters to be receiver of said bank.

That in the course of said last-named examination into the affairs of said bank the following facts were elicited from its books and records and are susceptible of strict proof therefrom.

That for several years past the said firm of Bain & Bro. have been at all times indebted to the said Exchange National Bank in large sums of money borrowed from said bank on their simple notes, payable to their own order, and without any other endorsement or security whatsoever; that immediately before the suspension aforesaid, to wit, on or about the 31st day of March, 1885, the Exchange National Bank held and owned the notes of the said Bain & Bro. as aforesaid, being the last renewals of their former notes, to the immense sum of $625,000, said notes having been discounted by the said bank for the said Bain & Bro.

And on the 2nd day of April, 1885, the date of suspension aforesaid, the said bank held and still holds, so discounted by said
405 bank for Bain & Bro., the sum of $325,000, the former amount having been reduced and withdrawn to that extent on or about the said 31st day of March, 1885, in the manner and by means of an agreement of that date, as set forth in the accompanying paper (which paper is fully set out in the bill filed in this suit).

That, in addition to the said sum of $325,000, for which the said

Bain & Bro. were liable as makers, they had endorsed and rediscounted at said bank, and were liable as endorsers on certain notes made by George M. Bain, Jr., Wallace & Son, and others, amounting in the aggregate to the immense sum of $581,971.49, for which large indebtedness, aggregating $906,971.49, the said Exchange National Bank holds no security whatsoever.

That the said Bain & Bro. are further indebted to the said bank in various sums, evidenced by due bills, aggregating $211.

That prior to the said 2nd day of April, 1885, the said George M. Bain, Jr., was indebted to the Exchange National Bank, individually and on joint account with John B. Whitehead, in the sum of $184,176.21 on promissory notes & overdrafts, joint account, and in the sum of $36,860.09 on promissory notes & due bills, individual account, and as endorser to the further sum of $34,738.73.

406 That James G. Bain was indebted to said bank on April 2, 1885, as maker of promissory notes, to the amount of $3,000, held and owned by said bank.

That among the promissory notes owned and held by said bank on April 2, 1885, the same being endorsed by said Bain & Bro., are notes of Wallace & Son, $80,000; Geo. T. Wallace, $25,000, for neither of which is collateral security held by the bank.

That the said Wallace & Son are endorsers upon notes of the Richmond Cedar Works to the amount of $139,101, which said notes were discounted by said bank.

That the said George M. Bain, Jr., James G. Bain, and R. T. K. Bain are officers and directors in said Exchange National Bank.

That the said George M. Bain, Jr., cashier as aforesaid, and the said James G. Bain and R. T. K. Bain, directors as aforesaid of the Exchange National Bank, did obtain the moneys, funds, and credits of said bank as a loan to them without any apparent security to the bank therefor, and incurred liabilities to said bank largely exceeding in amount one-tenth of the capital stock of said bank, and to a greater extent than is allowed by law, this in violation of

407 section 5200, Revised Statutes of the United States.

That the said George M. Bain, Jr., cashier of said bank, permitted the said loans to be made to said firm, of which he was a member, without requiring any security therefor or taking, if any, security altogether inadequate for said loans.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this eleventh day of May, 1885. Witness my hand and official seal.

[SEAL.] T. S. GARNETT, JR.,
Notary Public for the City of Norfolk.

408 W. H. PETERS, Receiver, *vs.* GEO. M. BAIN, Jr., *et als.*

This day personally appeared before me J. C. Everett, who, being duly sworn, testifies & says that within a day or two after Apr. 2d, 1885, it was a matter of common notoriety and newspaper publication that the indebtedness of Bain & Bro. to the Exchange National

Bank [of] Norfolk, Va., was in the neighborhood of $800,000, and that their assets would not exceed $300,000, and the amount of deposits with them at their banking-house in Portsmouth, Virginia, was estimated at $600,000 or $700,000.

J. C. EVERITT.

Subscribed and sworn to before me this 12th day of May, 1885.
[SEAL.] T. S. GARNETT, JR.,
Notary Public.

409 STATE OF VIRGINIA, *Corporation of the City of Norfolk,* } *To wit:*

The undersigned, Henry S. Herman, being first duly sworn, deposes and says that for some months prior to the insolvency of the Exchange National Bank of Norfolk he was employed in said bank, and during that time had charge of the books and records pertaining to discounted paper owned by said bank; that on or about March 31, 1885, promissory notes made by Messrs. Bain & Bro., of Portsmouth, and owned by said bank, aggregating about three hundred thousand dollars ($300,000), were withdrawn from the ownership of said bank and from its records; this said withdrawal was by order of George M. Bain, Jr., cashier of said bank, to me directed—$25,000 on March 16th, $25,000 on March 23d, $25,000 on March 30th, 1885, and $225,000 on March 31st; that in place of said notes so withdrawn were substituted, as I am informed and believe, the following-named stocks and bonds, par value, as follows:

Seaboard Compress Co. stock	300,000
Meherrin Valley railroad bonds	200,000
Southern Telegraph Co. bonds	140,000

H. S. HERMAN.

Subscribed and sworn to before me this 11th day of May, 1885. Witness my hand and official seal.
[SEAL.] T. S. GARNETT, JR.,
Notary Public for the City of Norfolk.

410 PETERS, Rec'r, *vs.* BAIN & BRO.

CITY OF NORFOLK:

I, Nathaniel Burruss and Geo. H. Newton, bankers, of the firm of Burruss, Son & Co., being first duly sworn, make oath that the Meherrin Valley railroad bonds are not taken in business here as collateral as of any value whatsoever, and that the same are believed to be worthless as securities, and that the bonds of the Southern Telegraph Company were last quoted, a few days ago, at seventeen cents on the dollar, and are now not quoted at all, and that said company is in the hands of a receiver appointed by this court.

NATHANIEL BURRUSS.
GEO. H. NEWTON.

Sworn to and subscribed before me this 12th day [of] May, 1885.
Witness my hand and official seal.
[SEAL.] T. S. GARNETT, JR.,
Notary Public.

411 The undersigned, Thomas Ott, being first duly sworn, deposes and says that for several months prior to the 2d day of April, 1885, and up to that time, he was employed as paying teller in the Exchange National Bank of Norfolk; that, at the close of business on March 31, 1885, or about noon of that day, the firm of Bain & Bros., bankers, of Portsmouth, Va., were indebted on open account to the said Exchange National Bank in the sum of one hundred and thirteen thousand four hundred forty-five and $\frac{21}{100}$ dollars ($113,445.21), said indebtedness being represented by a memorandum due bill of like amount; that on the said 31st day of March, after settlement, the said memorandum due bill of $113,445.21 was withdrawn from its place among the assets of said bank by order and direction of its then cashier, Mr. George M. Bain, Jr., but that said amount was not paid by said Bain & Bros., and, so far as said deponent knows, do debit was made on the books of said bank to the debit of the account or accounts of said Bain and Bro.

THOMAS OTT.

412 Sworn and subscribed to before me this twelfth day of May, A. D. 1885.
Witness my hand and official seal.
[SEAL.] JNO. H. HALL,
Notary Public.

413 UNITED STATES OF AMERICA,
Eastern District of Virginia:

The undersigned, Benjamin U. Keyser, being first duly sworn, deposes and says that he is an examiner of national banks, and that he is familiar with the affairs of the Exchange National Bank of Norfolk, Norfolk, Virginia, its assets, &c., &c.

That the face value of the securities turned over by Bain & Bros. to the said bank on March 31, 1885, is 640,000.

That, from his information and belief, the actual market value of said securities does not exceed $300,000.

That the actual indebtedness of Bain & Bro. to said bank is to-day, in the aggregate, about $1,200,000, and after the transfer of securities above referred to.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this 12th day of May, 1885.
[SEAL.] CHAS. T. BARRY,
U. S. Commissioner.

414 The undersigned, W. S. Wilkinson, being first duly sworn, deposes and says that he is now and was on the 31st day of March, 1885, the cashier of the Bank of Commerce of Norfolk, a corporation chartered under the laws of Virginia; that on the even-

ing of the said 31st of March, 1885, he was present, by invitation of the officers of the Exchange National Bank of Norfolk, at a meeting of capitalists at the dwelling of James G. Bain, at Portsmouth, Va., said meeting having been called, as was understood, to devise ways and means for restoring the said Exchange National Bank to a condition of solvency; that said meeting had before it a letter from the Comptroller of the Currency of the United States, reciting the perilous condition of said Exchange National Bank, and that it was on the brink of insolvency, and giving detailed reasons therefor. Among said reasons was the possession among the assets of said bank of a large amount of promissory notes, the collection of which was improbable and impossible by reason of the inability of the makers and payers to respond to demand for payment, and that they were in this respect practically insolvent.

415 That among the indebtedness so declared uncollectable was that of Messrs. Bain & Bro., of Portsmouth, aggregating the enormous amount of about $300,000.

That in order to assist the said bank in providing for collection of said indebtedness on the part of the said Bain & Bros. it was promised by the said Bain & Bros. that they would secure said bank by assigning to it such property, real, personal, and mixed, as they then possessed or could make available for such purpose.

WM. T. WILKINSON.

Subscribed and sworn to before me, a not'y publ. for corporation of Norfolk, State of Va., this 11th May, 1885.

Witness my hand & official seal.

[SEAL.] GEO. W. WILSON,
N. Publ.

416 CITY OF NORFOLK, *to wit:*

I, Wm. S. Wilkinson, make affidavit & say that I have not [at] any time bought or sold the bonds of either the Meherrin Valley railroad or the Southern Telegraph Company, & have not known of any market value or seen any quotation of value of the first named, but have seen some quotation of value of last named, which I do not remember. I further state that I have never considered bonds of said railroad & telegraph company as security for the loan of any amount of money.

Given under my hand this 12th day [of] May, 1885.

W. S. WILKINSON.

Subscribed & affirmed to before me, a not'y publ. for the city of Norfolk, State of Virginia, this 12th of May, 1885.

[SEAL.] GEO. W. WILSON,
Not'y Publ.

417 PETERS, Rec'r, *vs.* BAIN & BRO.

CITY OF NORFOLK, *to wit:*

I, Wm. Wallace Hunter, being first duly sworn, depose and make oath that I am secretary and treasurer of the Seaboard Compress Company of Norfolk, Va., and well acquainted with its affairs and

business, and that its capital stock is not now marketable and, I believe, cannot be pledged as collateral security at any greater rate than forty per cent. of its par value.

WM. WALLACE HUNTER.

Sworn to and subscribed before me this 12th day of May, 1885. Witness my hand and official seal.

T. S. GARNETT, JR.,
Notary Public for the City of Norfolk, Va.

418 The undersigned, Walter H. Doyle, being first duly sworn, deposes and says that he is now, and was on the 31st day of March, 1885, the cashier of the Citizens' Bank of Norfolk, a corporation chartered under the laws of Virginia; that on the evening of the said 31st of March, 1885, he was present, by invitation of the officers of the Exchange National Bank of Norfolk, at a meeting of capitalists, at the dwelling of James G. Bain, at Portsmouth, Va., said meeting having been called, as was understood, to devise ways and means for restoring the said Exchange National Bank to a condition of solvency; that said meeting had before it a letter from the Comptroller of the Currency of the United States, reciting the perilous condition of said Exchange National Bank, and that it was on the brink of insolvency, and giving detailed reasons therefor. Among said reasons was the possession, among the assets of said bank, of a large amount of promissory notes, the collection of which was improbable and impossible, by reason of the inability of the makers and payers to respond to demand for payment, & that they were, in this respect, practically insolvent; that among the indebtedness so declared uncollectable was that of Messrs. Bain & Bro., of
419 Portsmouth, aggregating the enormous amount of about $300,000; that, in order to assist the said bank in providing for collection of said indebtedness on the part of the said Bain & Bros., it was promised by the said Bain & Bros. that they would secure said bank by assigning to it such property, real, personal, and mixed, as they then possessed or could make available for such purpose.

WALTER H. DOYLE.

Subscribed and sworn to before me this eleventh day of May, 1885. Witness my hand and official seal.

[SEAL.] THEODORE S. GARNETT, JR.,
Notary Public for the City of Norfolk.

420 EXHIBIT filed with dep. of R. T. K. Bain—Q. 238.

$59,725.97. NEW YORK, 11*th Feb'y*, 1884.

On demand, pay to the order of ourselves fifty-nine thousand seven hundred & twenty-five $\frac{97}{100}$ dollars, value received, and charge to account of Guano, ex. Mount Edgecombe.

ROBERT NORMAN & CO.

To Messrs. Bain & Brother, Portsmouth, Va.

Stamped on top: "Cash."
Certified across face: "Good."

"GEO. M. BAIN, JR., *Cas.*"

Endorsed: Pay Brown Bros. & Co., or order. Robert Norman & Co. Pay Bank of New York, National Banking Association, or order. Brown Bros. & Co. Pay E. A. Hatton, cashier, or order, for account of Bank of New York, N. B. A. E. S. Mason, cashier.

Stamped: Paid Feb. 15, 1884. Bank of Portsmouth.

421 $63,184.29. JAN'Y 22, '85.

Pay guano ac., sixty-three thousand one hundred & eighty-four $\frac{29}{100}$ dollars.

GEO. R. ATKINSON, JR.

Filed with question 243.
Feb. 23d, '86. C. T. B., Master. R. T. K. BAIN.

422 $31,885.70. RICHMOND CEDAR WORKS (Limited),
RICHMOND, VA., *April 3rd*, 1885.

At sight pay to the order of Wallace & Son thirty-one thousand eight hundred & eighty-five $\frac{70}{100}$ dollars, and place to account of—

WM. H. PARRISH, *Secretary.*
JOHN OTT, *Treasurer.*

To Mess. Bain & Bro., No. 351 ——, Portsmouth, Va.

Endorsed: Wallace & Son. Filed as an exhibit with Q. 359 of R. T. K. Bain's dep.

423	3,750 acres land @ 10	$37,500 00
	137,500 So. T. bonds } @ 40	70,800
	40,000 B. & M. bonds }	
	Cook deeds, m't'g's	1,000
	Lumber in N. Y. sold	1,800
	20 miles railroad & its franchises }	150,000
	3 locomotives, *7 per mile* }	
	S. & R. R.	400
		$259,500

B. & M. B.

In our possession	25,000
Wire	3,000
	28,000

Exhibit "Z" with Dill's deposition.

424 The following are copies of Exhibits (checks) Nos. 15 to 21, inclusive, filed with question 83, deposition of R. T. K. Bain:

(Copy No. 15.)

$53,800. JUL. 11, 1883.

Exchange National Bank of Norfolk, Va.

Pay to P., F. & H., or bearer, fifty-three thousand eight hundred dollars.

No. —. BAIN & BRO.

(Copy No. 16.)

$27,000. NORFOLK, VA., *June* 28, 1883.

Exchange National Bank of Norfolk.

Pay to *P. F.* twenty-seven thousand dollars.

No. —. BAIN & BRO.

(Copy No. 17.)

$117,000.00. NORFOLK, VA., *Aug.* 1, 1883.

Exchange National Bank of Norfolk.

Pay to *P. F.* one hundred & seventeen thousand dollars.

No. —. BAIN & BRO.

(Copy No. 18.)

$171,557.50. NORFOLK, VA., *Sept.* 1, 1883.

Exchange National Bank of Norfolk.

Pay to *Pro Formas* one hundred & seventy-one thousand five hundred & fifty-seven $\frac{50}{100}$ dollars ($171,557.50).

No. —. BAIN & BRO.

(Copy No. 19.)

$75,000. NORFOLK, VA., *Sept.* 19, 1883.

Exchange National Bank of Norfolk.

Pay to the order of Ex. N. B'k Prof. seventy-five thousand dollars.

No. —. BAIN & BRO.

(Copy No. 20.)

$160,000. NORFOLK, VA., *Feb.* 6, 1884.

Exchange National Bank of Norfolk.

Pay to the *Pro Formas*, call, one hundred & sixty thousand dollars.

No. —. BAIN & BRO.

(Copy No. 21.)

$100,000. NORFOLK, VA., *Feb.* 15, 1884.

Exchange National Bank of Norfolk.

Pay to P. & H. one hundred thousand dollars.

No. —. BAIN & BRO.

425 The following are copies of Exhibits (checks) Nos. 1 to 14, inclusive, filed with questions 54 and 69, deposition of R. T. K. Bain:

(Copy of Exhibit Check No. 1.)

$316,375. NORFOLK, VA., *Dec.* 27, 1884.

The Exchange National Bank of Norfolk, Va.

Pay to *Pro Formas* to Dec. 19–2, or bearer, three hundred & sixteen thousand three hundred & seventy-five dollars.

No. —. BAIN & BRO.

(Copy No. 2.)

$50,000. NORFOLK, VA., *Sept.* 9, 1884.

The Exchange National Bank of Norfolk, Va.

Pay to N. P. B., or bearer, fifty thousand dollars.

No. —. BAIN & BRO.

(Copy No. 3.)

$285,000. NORFOLK, VA., *Oct.* 4, 1884.

The Exchange National Bank of Norfolk, Va.

Pay to *Pro Formas*, or bearer, two hundred & eighty-five thousand dollars.

No. —. BAIN & BRO.

(Copy No. 4.)

$205,000. NORFOLK, VA., *Jul.* 28, 1884.

Exchange National Bank of Norfolk.

Pay to *P. F.* two hundred & five thousand dollars.

No. —. BAIN & BRO.

(Copy No. 5.)

$3,386.74. NORFOLK, VA., *M'ch* 1, 1884.

Exchange National Bank of Norfolk.

Pay to the order of steamer Mt. Edgecombe thirty-three hundred & eighty-six $\frac{74}{100}$ dollars.

No. —. BAIN & BRO.

(Copy No. 6.)

$2,910. NORFOLK, VA., *Dec.* 31, 1883.

Exchange National Bank of Norfolk.

Pay to N. & O. M. C. twenty-nine hundred & ten dollars.

No. —. BAIN & BRO.

(Copy No. 7.)

$61,921.47. NORFOLK, VA., *Feb.* 24, 1885.

Exchange National Bank of Norfolk.

Pay to the order of Ex. N. Bank, call, sixty-one thousand nine hund. twenty-one $\frac{47}{100}$ dollars.

No. —. BAIN & BRO.

(Copy No. 8.)

$125,000. NORFOLK, VA., *Feb.* 27th, 1885.

Exchange National Bank of Norfolk.

Pay to the order of Ex. N. Bank one hundred twenty-five thousand dollars.

No. —. BAIN & BRO.

(Copy No. 9.)

$66,850. NORFOLK, VA., *M'ch* 5th, 1885.

Exchange National Bank of Norfolk.

Pay to the order of Ex. Nat. Bank sixty-six thousand eight hundred & fifty dollars.

No. —. BAIN & BRO.

(Copy No. 10.)

$11,047.94. NORFOLK, VA., *M'ch* 10, 1885.

The Exchange National Bank of Norfolk, Va.

Pay to Park & Han, or bearer, eleven thousand & forty-seven $\frac{94}{100}$ dollars.

No. —. BAIN & BRO.

(Copy No. 11.)

$35,186.07. NORFOLK, VA., *M'ch* 12, 1885.

Exchange National Bank of Norfolk.

Pay to the order of Ex. Nat. Bank thirty-five thousand one hund eighty-six $\frac{07}{100}$ dollars.

No. —. BAIN & BRO.

(Copy No. 12.)

$43,300. NORFOLK, VA., *M'ch* 12, 1885.

Exchange National Bank of Norfolk.

Pay to the order of Ex. N. Bank forty-three thousand three hundred dollars.

No. 13,773. BAIN & BRO.

(Copy No. 13.)

$2,179.33. NORFOLK, VA., *M'ch* 27, 1885.

Exchange National Bank of Norfolk.

Pay to the c'for twenty-one hundred & seventy-nine $\frac{33}{100}$ dollars.

No. —. BAIN & BRO.

(Copy No. 14.)

$21,602.43. NORFOLK, VA., *M'ch* 27, 1885.

Exchange National Bank of Norfolk.

Pay to Cash twenty-one thousand six hundred & two $\frac{43}{100}$ dollars.

No. —. BAIN & BRO.

426 EXHIBIT filed with deposition of W. H. Peters—Cross-examination No. 1.

Proposals.

RECEIVER'S OFFICE, EXCHANGE NATIONAL BANK,
NORFOLK, VA., *February* 16, 1886.

Proposals will be received at this office until Saturday, March 27, 1886, for the purchase of the hereinafter-mentioned property in its entirety, and also in pieces or parcels of the same, reference being

had to descriptive list of said property, which list, stating terms of sale, will be furnished upon application to the undersigned, who will have pleasure in extending every facility to parties desiring to examine the premises.

The right to reject any and all bids is reserved.

The property referred to is that of the Seaboard Compress Company of Norfolk, Va., a corporation perfectly solvent. Its books, which are open for examination, show earnings of handsome dividends on its capital stock of $500,000. The stock of the company, and the property represented by it, became an asset of the Exchange National Bank by transfer from parties who were debtors to the bank, and the same is now offered for sale under an order of court. This sale offers a fine opportunity to capital seeking investment in good productive property.

Proposals for the purchase of the property in its entirety are invited. Separate offers for each piece or parcel, as the same is numbered in the descriptive list above referred to, are also invited.

These latter offers will be considered and entertained, unless it shall appear that an offer more advantageous to the bank is submitted for the property as a whole.

In case sale is made in parcels, then the franchise of the company, together with the rights and privileges thereunto belonging, will be sold at public auction to the highest bidder, or otherwise, as may be determined.

No. 1 (in descriptive list) embraces the wharves and docks, warehouses, sheds, and tenements on the premises, together with all the land and water privileges of the company on the Portsmouth side of the river.

No. 2. One improved 90-inch "Morse cotton compress," with boilers and other appurtenances, also in Portsmouth.

No. 3. Six (6) steam hoisting-engines numbered 1, 2, 3, 4, 5, and 6. No. 3 also embraces ballast and coal-tubs, barrows, blocks, &c., &c. Separate offers will be received for each hoisting-engine, as well as for all, including the other articles enumerated in No. 3, also in Portsmouth.

No. 4. Sixty (60) trucks—Portsmouth.

No. 5. Eight (8) large cedar water-tanks, of 30,000 gallons and under, each—Portsmouth.

No. 6. Miscellaneous, such as lamps, tanks, cans, picks, axes, shovels, shears, and other tools—Portsmouth.

On Norfolk side.

No. 7. The cotton exchange building and warehouse and the ground they occupy.

No. 8. The compress buildings and the leases of the ground they occupy.

No. 9. A building, on leased land, capable of holding 1,000 bales of uncompressed cotton.

No. 10. One steam and hydraulic compress, 1,500 tons, Taylor's patent, with boilers and other appurtenances, in good condition.

No. 11. One ditto, ditto, 1,000 tons, Taylor's patent, with boilers and other appurtenances, in good condition. Steam band pullers—Miller's patent—are attached to and will be sold with each of these presses.

No. 12. The unexpired leases of the Tunis warehouse and lot covered by shed.

No. 13. The unexpired leases of the ends of Lee and Fayette streets.

No. 14. The steam-tug "Thos. A. Bain," new, well equipped, and in splendid condition.

No. 15. The steam-tug "Virginia," in good, serviceable condition.

No. 16. Three (3) transportation barges, in good condition, numbered 1, 2, and 3. Separate offers will be received for each, as well as for all.

No. 17. One oscillating engine, with shafting, hangers, and pullers, and one set elevating engines, elevators, &c., &c.

No. 18. Eighty (80) trucks and 8 canvas [tar]paulins.

No. 19. Fairbanks' platform scales, and cotton scales.

No. 20. Miscellaneous—tools, &c., &c., &c.

fe16-toma27 WM. H. PETERS, *Receiver.*

427 EXHIBIT MARKED "BAIN & BRO.'s DEBT." Filed with deposition of W. H. Peters—Q. 4.

Bain & Bro. in Account with the Exchange National Bank, Norfolk, Va.

Please examine and report on this account as soon as convenient.

	DR			CR.	
No.	Makers.	Matures.			
		1885.			
99681/2	No security	May 26	25,000		
631/4	"	June 1	25,000		
631/2	"	" 8	25,000		
100161/2	"	" 13	25,000		
99633/4	"	" 19	25,000		
681/4	"	" 26	25,000		
100163/4	"	July 6	25,000		
171/4	"	" 11	25,000		
171/2	"	" 17	25,000		
971/4	"	" 22	25,000		
971/2	"	" 29	25,000		
973/4	"	Aug. 22	25,000		
981/4	"	" 29	25,000		
			325,000		
	Endorser.				
397961/2	G. M. Bain, Jr.	Ap'l 2	13,000		
400063/4	"	May 3	9,000		
404241/2	"	July 3	9,000		
10126	R. T. K. Bain, Jr.	" 16	20,000		
10052	Atkinson, Geo. R., Jr.	Ap'l 27	1,100		
10030	Armstrong, S. S.	May 4	4,000	$20,000 — compromised for $10,000; secured; paid on ac. of same.	
10031	"	" 6	4,000		
10014	"	June 30	6,000		
10124	"	July 6	6,000		
10077	Ames, B. F. & J. E.	May 11	300	Paid in full	300
10083	" " & Mer. F. Co.	Jan. 23	360 49	Paid in full	360 49
10084	Ames, J. E., & Mer. F. Co.	"	360 49	Paid in full	360 49
10054	Ames, J. W., Sr.	July 10	2,000		
10107	Berry, Jno.	Ap'l 22	550	Paid on ac.	75
9931	Binford, J. M.	May 6	5,300	Paid on ac.	1,000
9937	Bunting, W. H.	July 28	1,500	Paid on ac.	800
10129	Bogart, J. H.	Sept. 10	5,218	Paid on ac.	1,518
10091	Baker, Ann V.	Aug. 1	1,190		
10102	Culpepper, H. E.	Ap'l 2	15,000	Paid on ac.	10,602
10120	Carney, W. B.	May 9	1,000	Paid in full	1,000
10104	" "	Ap'l 6	800	Paid in full	800
9996	Carney, S. B.	" "	7,000	$32,500—compromised for $16,250, secured notes.	
9997	" "	" 16	3,000		
10080	" (L. B. C.)	June 7	6,500		
9999	" (Amer. F. Co.)	July 4	2,807 30	Paid in full	2,807 30
10125	"	" 6	8,500		
10136	"	" 20	7,500		
10063	Dutton, W. C., & Co.	Ap'l 10	1,891 04		
9994	"	" 23	5,000		
34	"	May 8	5,000		
10065	" (T. Scott.)	" 10	2,588 07		
34	"	" 23	5,000		
35	"	June 8	5,000		
113	"	" 9	8,000		

EXHIBIT MARKED "BAIN & BRO.'s DEBT"—Continued.

No.	Endorser.	Matures.			
		1885.			
109	Duke & Smith	May 1	575	Paid on ac.	300
082	Duke, Jos. T.	Jan. 13	1,000	Paid on ac.	500
9795	Davis, Pat.	" 16	1,600	Paid in full	1,600
			501,640 39		
428	Amo. br't f'd		501,640 39		
10015	Etheridge & Brooks	Ap'l 17	10,000	Paid on ac.	4,000
078	" (T. & B.)	May 14	700	Paid in full	700
032	"	" 19	20,000		
112	"	" 20	15,000		
122	" (T. & B.)	June 11	500 58	Paid in full	500 58
018	"	19	20,000		
014	"	Ap'l 8	7,000	Paid in full	7,000 00
10051	Edwards, L. R. (E. & B.)	" 23	10,000		
66	"	May 23	10,000		
55	"	July 23	10,000		
9909	Greenville, L. & L. Co.	May 2	15,000		
10111	"	" 17	15,000		
9935	"	" 18	15,000		
10081	"	June 10	15,000		
113	"	July 5	15,000		
093	"	Aug. 6	10,000		
112	"	" 22	17,000		
9908	Ghio, E G. (H.E.C.)	Ap'l 27	600		
10094	Haynes, C. C.	Aug. 6	1,300		
027	Jones, Lee & Co.	Ap'l 22	5,000	Paid in full	5,000
119	Jenkins, C. E.	May 3	8,000		
053	Jordan, W. & R.	July 4	1,229 37	Paid on ac.	364 04
061	King, Jno. T., & Bro.	Ap'l 6	1,000	Paid in full	1,000
087	Love, Alex.	July 7	500		
106	McCullough, A. A.	Ap'l 18	425	Paid in full	425
019	Maynard, J. W.	July 25	4,000	Paid on ac.	500
105	Norsworthy, J. C.	Ap'l 18	1,750	Paid on ac.	850
108	"	" 24	1,500	Paid on ac.	400
9995	Niemeyer, H. C. & S. W.	" 29	5,000	Paid on ac.	100
10076	Niemeyer, W. A.	May 2	600		
79	" "	" 15	400		
10092	Old, W. R., & S. D. Ames	Aug. 5	1,000	Paid on ac.	700
9998	Old, W. R	June 23	1,802 40	Paid in full	1,802 40
9992	Parker, E. P.	Ap'l 5	1,250	Paid in full	1,250
10028	Riddick, A.	" 23	500	Paid on ac.	250
9794	Roper, Jno. L.	May 16	666	Paid in full	666
9848	Rodman, P.	June 4	2,500	Paid in full	2,500
10020	" "	Aug. 19	2,500	Paid on ac.	833
10067	Rich'd Cedar W'ks.	June 3	4,627 97		
68	"	" 4	4,597 25		
69	"	" 23	10,250	$43,101.80—compromised at 50c. cash.	
85	"	July 3	4,651 23		
86	"	" 4	4,635 16		
90	"	" 28	9,750		
70	"	Aug. 3	4,590 19		
29	Silverchorn, J. A.	Ap'l 23	900		
9936	Savage, W. B.	June 28	650	Paid in full	650
10089	" W. T.	July 27	1,121 77	Paid on ac.	600

EXHIBIT MARKED "BAIN & BRO.'s DEBT"—Continued.

No.	Endorser.	Matures.			
		1885.			
138	Spivey, J.	July 26	1,000	Paid in full	1,000
10064	Trotman, T. E.	Ap'l 26	1,500		
127	"	July 8	2,414 68		
10110	Traut, J. H.	May 2	600		
88	Taylor, J. C.	July 9	2,000	Paid in full	2,000
			801,651 99		
429					
	Amo. b't f'd		801,651 99		
10103	American Guano Co.	Ap'l 2	1,100	Paid on ac	200
16	"	May 2	2,800		
17	"	" 10	2,700		
62	Watts, L. R., *et als.*	Ap'l 10	3,000		
9993	Wallace & Son	" 7	16,000		
10026	"	" 21	16,000		
33	"	May 20	16,000		
121	"	June 4	16,000		
56	"	" 13	18,000		
123	Wallace, G. T.	" "	10,000		
137	"	July 20	15,000		
			918,251 99		
	Cash tickets	9			
	" "	10			
	40 borrowed	192			
			211		
	Ex. Nat. B'k stock, 582 shares, @ 100		58,200		
	Due bill, clearing-house settlement		2,035 72		
	Ex. Nat. B'k stock, Geo. M. Baine, Jr., 232 shares, @ 100		23,200		
	J.G. Bain, 91 shares, @ 100		9,100		
	Thos. A. Bain, 91 shares, @ 100		9,100		
	R. T. K. Bain, 91 shares, @ 100		9,100		
			1,029,198 71		

Endorsed: Peters, Rec'r, *vs.* Bain & Bro. Exhibit "Bain & Bro.'s debt." Filed with the papers in the cause. Produced by the plaintiff on his exam'n as a witness March 31st, 1886.

430 EXHIBIT MARKED "X." Filed with deposition of H. S. Herman—Question 3.

				Am't due the bank at the end of each month for due bills, &c.
1885.				
Jan. 31.	Credit bal. on "balance book"		39,242 45	
	Due bill in cash	161,374 13		
	Pro forma account	106,100 00		
			267,474 13	
				228,231 68
Feb. 28	Credit bal. on bal. book		12,717 67	
	Due bill in cash	38,188 62		
	Pro forma account	134,850 00		
			173,038 62	
				160,320 95
M'ch 31.	Credit bal. on bal. book		211 62	
	Due bill in cash	113,445 21		
M'ch 30.	*Pro forma* account	133,500		
			246,945 21	
				246,733 59
May 11.	Credit bal. on bal. book		668 20	
	Due bill in cash	2,035 72		
	Pro forma ac. closed out M'ch 31.			
			*2,035 72	
				1,367 52
431				
1884.				
Jan'y 31.	Credit bal. on bal. book		152,696 96	
	Due bill in cash	80,928 43		
	Pro forma account	202,172 00		
			283,100 43	
				130,403 47
Feb. 29.	Credit bal. on bal. book		85,379 84	
	Due bill in cash	31,800 66		
	Pro forma account	91,685 00		
			123,485 66	
				38,105 82
M'ch 31.	Credit bal. on bal. book		65,668 42	
	Due bill in cash	55,224 37		
	Pro forma account	258,188 00		
			313,412 37	
				247,743 95
Ap'l 30.	Overdraft on bal. book		25,567 78	
	Due bill in cash	132,672 76		
	Pro forma account	83,400 00		
			216,072 76	
				241,640 54
May 31.	Credit bal. on bal. book		228,058 33	
	Due bill in cash	198,018 82		
	Pro forma account	200,450 00		
			398,468 82	
				170,410 49
June 30.	Credit bal. on bal. book		141,779 59	
	Due bill in cash	100,494 63		
	Pro forma account	190,416 14		
			290,900 77	
				149,121 18
July 31.	Overdraft on bal. book		42,066 51	
	Due bill in cash	78,131 96		
	Pro forma account	192,325 00		
			270,456 96	
				312,523 47

* Bank held checks, &c., on B. & Bro. for this amount, Ap'l 2, '85.

				Am't due the bank.
1884.				
Aug. 30.	Credit bal. on bal. book		27,110 25	
	Due bill in cash	99,358 41		
	Pro forma account	293,820 00		
			393,178 41	
				366,068 16
Sep. 30.	Credit bal. on bal. book		126,262 95	
	Due bill in cash	189,371 44		
	Pro forma ac.	321,600 00		
			510,971 44	
				384,708 49
Oct. 31.	Credit bal. on bal. book		51,342 69	
	Due bill in cash	252,614 24		
	Pro forma ac.	199,332 87		
			451,947 11	
				400,604 42
Nov. 29.	Credit bal. on bal. book		34,338 60	
	Due bill in cash	249,212 57		
	Pro forma ac.	230,750 00		
			479,962 57	
				445,623 97
Dec. 31.	Overdraft on bal. book		38,400 20	
	Due bill in cash	289,741 93		
	Pro forma ac.	40,075 00		
			329,816 93	
				368,217 13
432				
1883.				
Jan. 31.	Overdraft on bal. book		27,536 24	
	Due bill in cash	62,980 78		
	Pro forma ac. ("state of bank")	87,500 00		
			150,480 78	
				178,017 02
Feb. 28.	Credit bal. on bal. book		86,748 52	
	Due bill in cash	62,348 00		
	Pro forma ac.	191,960 00		
			254,308 00	
				167,559 48
M'ch 31.	Credit bal. on bal. book		76,848 20	
	Due bill in cash	37,560 97		
	Pro forma ac.	112,483 00		
			150,042 97	
				73,195 77
Ap'l 30.	Credit bal. on bal. book		31,258 82	
	Due bill in cash	30,713 62		
	Pro forma ac.	44,000 00		
			74,713 62	
				43,454 80
May 31.	Credit bal. on bal. book		120,119 31	
	Due bill in cash	65,054 85		
	Pro forma ac.	179,344 00		
			244,398 85	
				124,279 54
June 30.	Credit bal. on bal. book		24,494 14	
	Due bill in cash	15,402 93		
	Pro forma ac.	20,019 66		
			35,422 59	
				10,928 45
July 31.	Credit bal. on bal. book		36,823 09	
	Due bill in cash	24,207 35		
	Pro forma ac.	149,752 00		
			173,959 35	
				137,136 26

				Am't due the bank
1883.				
Aug. 31.	Overdraft on bal. book		15,775 74	
	Due bill in cash	13,800 10		
	Pro forma ac.	191,557 50		
			205,357 60	
				221,133 34
Sep. 29.	Overdraft on bal. book		43,757 36	
	Due bill in cash	23,813 40		
	Pro forma ac.	135,200 00		
			159,013 40	
				202,770 76
Oct. 31.	Credit bal. on bal. book		86,995 68	
	Due bill in cash	108,576 57		
	Pro forma ac.	187,509 00		
			296,085 57	
				209,089 89
Nov. 30.	Credit bal. on bal. book		55,566 20	
	Due bill in cash	103,147 83		
	Pro forma ac.	195,263 94		
			298,411 77	
				242,845 57
Dec. 31.	Overdraft on bal. book		1,256 35	
	Due bill in cash	98,440 54		
	Pro forma ac.	91,354 00		
			189,794 54	
				191,050 89

433

				Am't due the bank.	Credit balance.
1882.					
Jan. 31.	Overdraft on bal. book		27,306 21		
	Due bill in cash	46,485 46			
	Pro forma ac.	35,400 00			
			81,885 46		
					109,191 67
Feb'y 28.	Overdraft on bal. book		30,369 80		
	Due bill in cash	32,120 18			
	Pro forma ac.	49,920 52			
			82,040 70		
					112,410 50
M'ch 31.	Overdraft on bal. book		1,590 50		
	Due bill in cash	28,074 31			
	Pro forma ac.	47,991 61			
			76,065 92		
					77,656 42
Ap'l 29.	Credit bal. on bal. book		36,066 55		
	Due bill in cash	35,767 49			
	Pro forma ac.	36,393 75			
			72,161 24		
					36,094 69
May 31.	Credit bal. on bal. book		43,710 24		
	Due bill in cash	53,775 89			
	Pro forma ac.	69,612 03			
			123,387 92		
					79,677 68
June 30.	Credit bal. on bal. book		30,101 44		
	Due bill in cash	66,209 76			
	Pro forma ac.	119,500 00			
			185,709 76		
					155,608 32
July 31.	Credit bal. on bal. book		22,588 17		
	Due bill in cash	107,476 31			
	Pro forma ac.	75,000 00			
			182,476 31		
					159,888 14

				Am't due the bank.	Credit balance.
1882.					
Aug. 31.	Overdraft on bal. book		37,397 79		
	Due bill in cash	80,056 15			
	Pro forma ac.	180,000 00			
			260,056 15		
					297,453 94
Sep. 30.	Credit bal. on bal. book		72,538 68		
	Due bill in cash	138,037 70			
	Pro forma ac.	77,400 00			
			215,437 70		
					142,899 02
Oct. 31.	Credit bal. on bal. book		86,734 69		
	Due bill in cash	105,977 24			
	Pro forma ac.	63,600 00			
			169,577 24		
					82,842 55
Nov. 29.	Credit bal. on bal. book		69,571 95		
	Due bill in cash	120,191 93			
	Pro forma ac.	60,700 00			
			180,891 93		
					111,319 98
Dec. 30.	Overdraft on bal. book		9,230,44		
	Due bill in cash	65,332 53			
	Pro forma ac.	10,900 00			
			76,232 53		
					85,462 97
434					
1881.					
Jan. 31.	Credit bal. on bal. book		46,820 18		
	Due bill in cash	116,515 33			
	Pro forma ac.	16,235 02			
			132,750 35		
					85,930 17
Feb. 28.	Overdraft on bal. book		14,923 54		
	Due bill in cash	50,700 21			
	Pro forma ac.	67,985 00			
			118,685 21		
					133,608 75
M'ch 31.	Overdraft on bal. book		8,572 95		
	Due bill in cash	77,958 13			
	Pro forma ac.	39,050 00			
			117,008 13		
					125,581 08
Ap'l 30.	Credit bal. on bal. book		15,245 31		
	Due bill in cash	48,389 05			
	Pro forma ac.	35,649 49			
			84,038 54		
					68,793 23
May 31.	Overdraft on bal. book		44,657 75		
	Due bill in cash	47,495 94			
	Pro forma ac.	29,150 00			
			76,645 94		
					121,303 69
June 30.	Credit bal. on bal. book		24,882 96		
	Due bill in cash	47,924 96			
	Pro forma account	41,600 00			
			89,524 96		
					64,642 00
July 30.	Credit bal. on bal. book		10,598 24		
	Due bill in cash	87,133 94			
	Pro forma account	61,607 62			
			148,741 56		
					138,143 32

				Am't due the bank.	Credit balance.
1881.					
Aug. 31.	Credit bal. on bal. book		5,482 95		
	Due bill in cash	3,937 82			
	Pro forma ac.	1,250 00			
			5,187 82		
					295 13
Sep. 30.	Overdraft on bal. book		32,569 67		
	Due bill in cash	58,358 65			
	Pro forma ac.	25,650 00			
			84,008 65		
				116,578 32	
Oct. 31.	Overdraft on bal. book		8,932 80		
	Due bill in cash	49,332 69			
	Pro forma ac.	30,208 07			
			79,540 76		
				88,473 56	
Nov. 30.	Credit bal on bal. book		4,671 02		
	Due bill in cash	54,588 75			
	Pro forma ac.	33,550 00			
			88,138 75		
				83,467 73	
Dec. 31.	Credit bal. on bal. book		17,819 87		
	Due bill in cash	44,231 39			
	Pro forma ac.	30,600 00			
			74,831 39		
				57,011 52	
435					
1880.					
Jan'y 31.	Overdraft on bal. book		17,239 68		
	Due bill in cash	15,293 15			
	Pro forma ac.	21,223 00			
			36,516 15		
				53,755 83	
Feb. 28.	Overdraft on bal. book		22,649 61		
	Due bill in cash	27,498 87			
	Pro forma ac.	18,333 64			
			45,832 51		
				68,482 12	
M'ch 31.	Overdraft on bal. book		30,559 44		
	Due bill in cash	36,085 70			
	Pro forma ac.	36,360 57			
			72,446 27		
				103,005 71	
Ap'l 30.	Overdraft on bal. book		30,837 04		
	Due bill in cash	42,223 22			
	Pro forma ac.	28,301 00			
			70,524 22		
				101,361 26	
May 31.	Credit bal. on bal. book		16,235 84		
	Due bill in cash	51,679 48			
	Pro forma ac.	66,266 13			
			117,945 61		
				101,709 77	
June 30.	Overdraft on bal. book		16,980 98		
	Due bill in cash	4,376 74			
	Pro forma ac.	16,824 00			
			21,200 74		
				38,181 72	
July 31.	Credit bal. on bal. book		19,030 68		
	Due bill in cash	29,434 29			
	Pro forma ac.	35,300 00			
			64,734 29		
				45,703 61	

				Am't due the bank.	Credit balance.
1880.					
Aug. 31.	Overdraft on bal. book		5,416 00		
	Due bill in cash	75,346 17			
	Pro forma ac.	00,000 00			
			75,346 17		
				80,726 40	
Sep. 30.	Credit bal. on bal. book		3,607 68		
	Due bill in cash	44,811 64			
	Pro forma ac.	17,499 56			
			62,311 20		
				58,703 52	
Oct. 30.	Credit bal. on bal. book		84,374 28		
	Due bill in cash	78,913 63			
	Pro forma ac.	9,333 04			
			88,246 67		
				3,872 39	
Nov. 30.	Credit bal. on bal. book		39,346 54		
	Due bill in cash	70,797 27			
	Pro forma ac.	15,000 00			
			85,797 27		
				46,450 73	
Dec. 31.	Overdraft on bal. book		39,929 59		
	Due bill in cash	85,995 96			
	Pro forma ac.	18,447 00			
			104,442 96		
				144,372 55	
436					
1879.					
Jan. 31.	Credit bal. on bal. book		7,744 61		
	Due bill in cash	5,762 75			
	Pro forma ac.	28,824 75			
			34,587 50		
				26,842 89	
Feb. 28.	Credit bal. on bal. book		9,261 64		
	Due bill in cash	13,144 96			
	Pro forma ac.	14,101 75			
			27,246 71		
				17,985 07	
M'ch 31.	Credit bal. on bal. book		11,183 91		
	Due bill in cash	10,959 76			
	Pro forma ac.	22,522 75			
			33,482 51		
				22,298 60	
Ap'l 30.	Credit bal. on bal. book		3,351 47		
	Due bill in cash	19,503 00			
	Pro forma ac.	43,116 75			
			62,619 75		
				59,268 28	
May 31.	Overdraft on bal. book		31,874 61		
	Due bill in cash	11,161 16			
	Pro forma ac.	15,175 00			
			26,336 16		
				58,210 77	
June 30.	Credit bal. on bal. book		38,840 05		
	Due bill in cash	0,000 00			
	Pro forma ac.	31,687 91			
			31,687 91		
					7,152 14
July 31.	Credit bal. on bal. book		30,522 39		
	Due bill in cash	1,962 63			
	Pro forma ac.	30,551 75			
			32,514 38		
				1,991 99	

					Am't due the bank.	*Credit balance.*
1879.						
Aug. 30.	Credit bal. on bal. book			5,498 43		
	Due bill in cash	8,811 30				
	Pro forma ac.	34,500 00				
				43,311 30		
					37,812 87	
Sep. 30.	Overdraft on bal. book			8,281 04		
	Due bill in cash	13,686 50				
	Pro forma ac.	25,633 00				
				39,319 50		
					47,600 54	
Oct. 31.	Credit bal. on bal. book			9,217 86		
	Due bill in cash	52,136 56				
	Pro forma ac.	40,930 37				
				93,066 93		
					83,849 07	
Nov. 29.	Credit bal. on bal. book			1,360 34		
	Due bill in cash	46,673 38				
	Pro forma ac.	41,500 00				
				88,173 38		
					86,813 04	
Dec. 31.	Overdraft on bal. book			12,356 39		
	Due bill in cash	87,084 39				
	Pro forma ac.	25,656 00				
				112,740 39		
					125,096 78	
437						
1878.						
Jan. 31.	Credit bal. on bal. book			23,768 67		
	Due bill in cash	2,774 94				
	Pro forma ac.	18,416 64				
				21,191 58		
						2,577 09
Feb. 28.	Credit bal. on bal. book			9,071 67		
	Due bill in cash	13,445 97				
	Pro forma ac.	13,022 13				
				26,468 10		
					17,396 43	
M'ch 30.	Overdraft on bal. book			13,566 05		
	Due bill in cash	5,027 59				
	Pro forma ac.	22,375 00				
				27,402 59		
					40,968 64	
Ap'l 30.	Overdraft on bal. book			2,286 65		
	Due bill in cash	5,777 78				
	Pro forma ac.	300 00				
				6,077 78		
					8,364 43	
May 31.	Credit bal. on bal. book			3,321 86		
	Due bill in cash	10,987 99				
	Pro forma ac.	5,700 00				
				16,687 99		
					13,366 13	
June 30.	Credit bal. on bal. book			20,565 60		
	Due bill in cash	1,320 23				
	Pro forma ac.	4,243 00				
				5,563 23		
						15,002 37
July 31.	Overdraft on bal. book			381 80		
	Due bill in cash	6,404 13				
	Pro forma ac.	36,400 00				
				42,804 13		
					43,185 93	

				Am't due the bank.	Credit balance.
1878.					
Aug. 31.	Credit bal. on bal. book		317 07		
	Due bill in cash	6,531 47			
	Pro forma ac.	38,550 00			
			45,081 47		
				44,764 40	
Sep. 30.	Overdraft on bal. book		1,499 12		
	Due bill in cash	12,054 38			
	Pro forma ac.	16,990 00			
			29,044 38		
				30,543 50	
Oct. 31.	Credit bal. on bal. book		41,218 25		
	Due bill in cash	19,608 01			
	Pro forma ac.	27,848 50			
			47,456 51		
				6,238 26	
Nov. 30.	Credit bal. on bal. book		10,059 23		
	Due bill in cash	22,864 40			
	Pro forma ac.	28,101 75			
			50,966 15		
				40,906 92	
Dec. 31.	Overdraft on bal. book		6,202 93		
	Due bill in cash	18,109 94			
	Pro forma ac.	17,901 75			
			36,011 69		
				42,214 62	
438					
1877.					
Jan. 31.	Credit bal. on bal. book		21,176 95		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	6,338 68			
			6,338 68		
					*14,838 27
Feb. 28.	Credit bal. on bal. book		10,633 04		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	11,260 00			
			11,260 00		
				626 96	
M'ch 31.	Overdraft on bal. book		1,616 20		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	36,174 12			
			36,174 12		
				37,790 32	
Ap'l 30.	Credit bal. on bal. book		12,794 65		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	30,310 00			
			30,310 00		
				17,515 35	
May 31.	Overdraft on bal. book		1,043 60		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	28,741 43			
			28,741 43		
				29,785 03	
June 30.	Credit bal. on bal. book		17,803 01		
	Due bill in cash.				
	Pro forma ac.	5,310 00			
			5,310 00		
					*12,493 01

* Does not include due bills.

				Am't due the bank.	*Credit balance.*
1877.					
July 31.	Credit bal. on bal. book		8,565 15		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	4,100 00			
			4,100 00		
					*4,465 15
Aug. 31.	Credit bal. on bal. book		10,995 84		
	Due bill in cash	10,639 97			
	Pro forma ac.	30,600 00			
			41,239 97		
				30,244 13	
Sep. 29.	Credit bal. on bal. book		4,385 75		
	Due bill in cash	11,061 13			
	Pro forma ac.	38,199 00			
			49,260 13		
				44,874 38	
Oct. 31.	Credit bal. on bal. book		6,680 96		
	Due bill in cash	5,038 90			
	Pro forma ac.	21,910 00			
			26,948 90		
				20,267 94	
Nov. 30.	Credit bal. on bal. book		7,201 67		
	Due bill in cash	9,659 86			
	Pro forma ac.	28,610 00			
			38,269 86		
				31,068 19	
Dec. 31.	Credit bal. on bal. book		21,053 16		
	Due bill in cash	6,078 18			
	Pro forma ac.	11,810 00			
			17,888 18		
					3,164 98
439					
1876.					
Jan. 31.	Credit bal. on bal. book		27,155 35		
	Due bill in cash	6,129 13			
	Pro forma ac.	0,000 00			
			6,129 13		
					21,026 22
Feb. 29.	Overdraft on bal. book		7,228 56		
	Due bill in cash	6,576 77			
	Pro forma ac.	0,000 00			
			6,576 77		
				13,805 33	
M'ch 31.	Credit bal. on bal. book		15,769 29		
	Due bill in cash	12,671 52			
	Pro forma ac.	00,000 00			
			12,671 52		
					3,097 77
Ap'l 29.	Credit bal. on bal. book		58,063 55		
	Due bill in cash	14,288 02			
	Pro forma ac.	0,000 00			
			14,388 02		
					43,675 53
May 31.	Credit bal. on bal. book		9,098 90		
	Due bill in cash	9,549 04			
	Pro forma ac.	0,000 00			
			9,549 04		
				450 14	
June 30.	Overdraft on bal. book		4,111 92		
	Due bill in cash	0,000 00	0,000 00		
	Pro forma ac.	0,000 00	0,000 00		
				4,111 92	

* Does not include due bills.

				Am't due the bank.	Credit balance.
1876.					
July 31.	Credit bal. on bal. book		17,274 21		
	Due bill in cash	276 51			
	Pro forma ac.	000 00			
			276 51		
					16,997 70
Aug. 31.	Credit bal. on bal. book		10,838 91		
	Due bill in cash	19,599 88			
	Pro forma ac.	0,000 00			
			19,599 88		
				8,760 97	
Sep. 30.	Credit bal. on bal. book		49,422 06		
	Due bill in cash	17,810 59			
	Pro forma ac. (Com. Sep. 21	5,600 00			
			23,410 59		
					26,011 47
Oct. 31.	Credit bal. on bal. book		22,337 72		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	16,360 00			
			16,360 00		
					*5,977 72
Nov. 29.	Credit bal. on bal. book		24,833 51		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	39,275 50			
			39,275 50		
				*14,441 99	
Dec. 30.	Credit bal. on bal. book		28,948 58		
	Due bill in cash. Cannot find settlement book.				
	Pro forma ac.	20,000 00			
			20,000 00		
					*8,948 58

440

				Am't due the bank at the end of each month as per dates on margin.	Cr. bal. at the end of month as per dates on margin.
1875.					
Jan. 30.	Credit bal. on bal. book		18,867 27		
	Due bill in cash		0,000 00		
					18,867 27
Feb. 27.	Credit bal. on bal. book		13,481 68		
	Due bill in cash		6,842 64		
					6,639 04
M'ch 31.	Credit bal. on bal. book		4,712 81		
	Due bill in cash		28,822 42		
				24,109 61	
Ap'l 30.	Credit bal. on bal. book		1,772 58		
	Due bill in cash		10,875 86		
				9,103 28	
May 31.	Credit bal. on bal. book		2,200 35		
	Due bill in cash		2,976 16		
				775 81	
June 30.	Credit bal. on bal. book		11,211 07		
	Due bill in cash		10,404 37		
					806 70
July 31.	Overdraft on bal. book		7,141 73		
	Due bill in cash		4,511 28		
				11,653 01	

* Does not include due bills.

			Am't due the bank at the end of each month as per dates on margin.	*Cr. bal. at the end of month as per dates on margin.*
1875.				
Aug. 31.	Credit bal. on bal. book	8,019 98		
	Due bill in cash	13,786 11		
			5,766 13	
Sep. 30.	Credit bal. on bal. book	12,438 04		
	Due bill in cash	7,281 81		
				5,156 23
Oct. 30.	Credit bal. on bal. book	18,243 50		
	Due bill in cash	20,218 25		
			1,974 75	
Nov. 30.	Credit bal. on bal. book	9,248 49		
	Due bill in cash	21,647 08		
			12,398 59	
Dec. 31.	Credit bal. on bal. book	10,038 98		
	Due bill in cash	16,215 78		
			6,176 80	
441				
1874.				
Jan. 31.	Credit bal. on bal. book	6,003 83		
	Due bill in cash.*			
Feb. 28.	Credit bal. on bal. book	14,210 29		
	Due bill in cash.*			
M'ch 31.	Credit bal. on bal. book	24,526 83		
	Due bill in cash.*			
Ap'l 30.	Credit bal. on bal. book	9,200 91		
	Due bill in cash	18,193 95		
			8,993 04	
May 30.	Credit bal. on bal. book	8,250 95		
	Due bill in cash	2,773 10		
				5,477 85
June 30.	Credit bal. on bal. book	18,035 21		
	Due bill in cash	3,458 60		
				14,576 61
July 31.	Credit bal. on bal. book	33,886 36		
	Due bill in cash	0,000 00		
				33,886 36
Aug. 31.	Credit bal. on bal. book	16,248 97		
	Due bill in cash	0,000 00		
				16,248 97
Sep. 30.	Credit bal. on bal. book	1,765 93		
	Due bill in cash	3,025 02		
			1,259 09	
Oct. 30.	Credit bal. on bal. book	21,994 84		
	Due bill in cash	16,589 04		
				5,405 80
Nov. 30.	Credit bal. on bal. book	2,578 69		
	Due bill in cash	7,849 85		
			5,271 16	
Dec. 31.	Credit bal on bal. book	6,671 43		
	Due bill in cash	15,770 43		
			9,099 00	

*Cannot find B. & Bros.' settlement book for Jan'y, Feb'y, & March.

442 *Pro Forma.*

(EXHIBIT "Y." Filed with depos'n of H. S. Herman—quest'n 9.)

No. _____
Due _____
Date _____
Time _____
$ _____

Drawer

_____

Payer

_____

Where payable

_____

Where sent

_____

Indorser

_____
_____

443 (Copy.)

RECEIVER'S OFFICE, EXCHANGE NATIONAL BANK,
NORFOLK, VA., *May* 22*d*, 1885.

To Messrs. John T. Griffin, John B. Jenkins, and William W. Old, trustees, &c.

GENTLEMEN: I respectfully request that the books of account and papers of the late firm of Bain & Bro., mentioned in their deed of April 6th, 1885, as conveyed to you, be open to my inspection, and that I, or my attorney, may examine the same at your early convenience.

I would also ask that you furnish me with a statement of the assets and liabilities of Bain & Bro. as soon as practicable.

Very respectfully yours,
(Signed) WM. H. PETERS, *Receiver.*

Exhibit X Y. Filed with dep. of W. W. Old, Ap'l 8, '86. C. T. Barry, Sp. Master.

444 BANKING HOUSE OF BAIN & BROTHER,
PORTSMOUTH, VA., *May* 23*d*, 1885.

To Wm. H. Peters, Esqr., receiver Exchange National Bank, Norfolk, Va.

DEAR SIR: Your communication of the 22d inst. was received to-day. One of the trustees, Mr. Old, is absent from the city, but

will be back in a day or two, when we will make answer to your proposition.

Very respectfully yours,

JNO. T. GRIFFIN,
JOHN B. JENKINS,
Trustees.

Exhibit "Z." Filed with question 73, deposition of Wm. W. Old, Mr. Peters *vs.* Ex. Nat'l Bank. Filed Ap'l 8th, '86. C. T. Barry.

445 BANKING HOUSE OF BAIN & BROTHER,
PORTSMOUTH, VA., *May* 25, 1885.

Mr. Wm. H. Peters, receiver.

DEAR SIR: Recurring to your letter of May 22d, 1885, asking that you or your attorney may examine the books of account and papers of the late firm of Bain & Bro., mentioned in their deed of April 6th, 1885, we would say that the said books of account and papers are in constant use by us in the preparation of our statement to be made to the court and in the settlement of the affairs of Bain & Bro., and besides, as you are not claiming any benefits under the said deed of trust, we are unable to see that you or your attorney are entitled to make such examination.

We would also say that as soon as we can make up the inventory required by the court we will file it, and from that you may get such knowledge of the assets as we possess. As to the liabilities, until the books of Bain & Bro. are written up, in which work we are now engaged, we cannot give such statement, but as soon as it is
446 possible to do so we will furnish the same to any creditors secured by the deed of trust who may desire it.

Yours respectfully,

WM. W. OLD.
JOHN B. JENKINS.
JNO. T. GRIFFIN.

Exhibit "Y." Filed with question 73, dep. of W. W. Old. Filed Ap'l 7th, '86. C. T. Barry.

447 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. H. PETERS, Receiver, &c., *vs.* BAIN & BRO. and Others.

To the hon. judges of the circuit court of the United States for the eastern district of Virginia:

In view of the fact that this cause is now ready for a hearing on its merits, we, the undersigned trustees, deem it due to ourselves and for a better understanding of our accounts as they have been rendered from month to month under the order in this cause of the 12th day of May, 1885, that we should make in connection with our statement for the month of April, 1886, which we herewith submit, a more detailed statement of the condition of the trust subject in our hands than we were called upon to make in rendering our monthly statements.

As may be seen by the several monthly statements for the several months preceding April, 1886, we have reported the results of our monthly transactions in such form that the court could see at a glance the amounts received and disbursed by us and the
448 amount of cash on hand from time to time, and in what banks the same is deposited. We did not construe the order to mean that we should render a detailed statement of all the disbursements further than is shown by said statements, because we have supposed that upon a settlement of our accounts in the suit instituted for that purpose we would go into such details with the production of our vouchers as would show the propriety in every respect of our transactions; and we beg to call the attention of the court to the fact that early in this litigation we filed our cross-bill in this suit with this object in view, as well as for such instructions and authority as might be necessary for the proper administration of the trust subject.

The following is a general statement of our receipts and disbursements up to May 1st, 1886:

	Receipts.	Disbursements.
To June 1st, 1885	$44,942 59	$15,507 44
June "	29,577 02	10,347 71
July "	35,964 20	12,208 56
August "	14,863 26	7,964 33
September "	17,018 85	5,308 08
October "	7,428 99	13,432 24
November "	6,252 42	5,321 35
To December 1st, 1885	20,609 23	15,510 25
449 January, 1886	5,461 71	1,637 51
February, "	4,027 31	956 55
March, 1886	8,282 74	2,129 58
April, "	5,538 29	2,805 17
	$199,966 61	$93,128 77
Total receipts		$199,966 61
Total disbursements		93,128 77
In hand May 1st, 1886		$106,837 84

Which is deposited as follows:

In the Citizens' Bank of Norfolk	$32,585 63
" Marine Bank of Norfolk	30,933 24
" Norfolk National Bank	15,412 88
" Bank of Commerce	9,656 26
" Savings Bank of Norfolk	1,977 08
" Merchants' & Farmers' Bank of Portsmouth	15,894 39
" Bank of Portsmouth	83 49
Cash in office	294 87
	$106,837 84

Upon the filing of the amended bill in this cause in September, 1885, when it was apparent that this litigation would be prolonged, we sought to make arrangements with the several banks in which we had made deposits (except the Bank of Portsmouth, in which we kept an active account) for the payment of interest on said deposits,
450 and did make arrangements that the deposits in said banks should bear three per centum per annum interest from September 15th, 1885, and on January 1st, 1886, this interest was credited to us by the said banks, and a like credit will be made on July 1st, 1886, and every six months unless the money be sooner withdrawn. The several banks upon a conference decided upon the allowance of this interest, and it was all that we could get without withdrawing the funds from this community, which we thought best not to do.

As will be seen by our statements, our disbursements have been large, but they are explained fully by the details.

In carrying on during the spring and summer of 1885 the farms of Bain & Bro., including those conveyed by Wallace & Son, for the purpose of realizing for the trust the expenditures already made thereon, it was necessary that we should make purchases of barrels, boxes, and other articles, as well as guano, necessary for the purpose of growing, gathering, and shipment of the trucks already in the ground and other produce, and also to pay out large sums for labor. Our books show that the receipts and disbursements on the farms of Bain & Bro. were as follows:

451

	Receipts.	Disbursements.
Prospect farm	$4,334 37	$2,375 36
Kay farm	10,984 84	5,337 11
Beaton farm	6,765 53	3,665 32
Moore farm	3,808 71	1,976 20
Bowers hill	3,847 73	3,179 44
	$29,741 18	$16,533 43

Showing receipts in excess of disbursements of $13,207.75. But for the low prices of trucks during the past season this exhibit would have been much more satisfactory, but as it is it represents that much virtually saved to the trust subject.

When we first took charge of the trust property we found the labor on the Wallace and other farms much demoralized on account of an apprehension on their part that they would lose what was due them for back wages. These laborers were, with few exceptions, colored men, and very poor. As the deed provided for the payment of the wages which were due to these laborers, and a continuance of their services was deemed all important at that time of the year for the successful cultivation of the crops then growing, we promptly
452 arranged for the payment of all these claims, and they were paid off before the injunction issued in this cause.

These expenses are charged as part of the expenses against the Wallace and other farms. There is, therefore, little or nothing due

to the laborers or employees of George T. Wallace, Wallace & Son, or those of Bain & Bro.

We have also paid off, under an order of this court, a debt due Thomas M. Wilson of $6,376.66, principal and interest, which was a prior lien on the Wallace lands.

There is one other lien of $6,000 and interest on these lands, due W. & J. Parker, which has not yet been paid.

The amounts altogether paid out for labor, taxes, and expenses attending the Wallace farms, and the lien in favor of Mr. Wilson, is $19,054.14, but the receipts from same source, including sales of personal property, are in excess of the said expenditures $29,569.75.

We have kept the property in our charge insured, and the cost of this has been a considerable sum; and we have also paid all taxes on the property for 1885 and unpaid taxes for prior years,
453 These amounted to quite a large sum. The expenses of the trust have therefore been necessarily heavy, and they have been very much increased by this litigation. For the first few months of our administration, and especially during the trucking season, we found it necessary to employ four, and sometimes five, clerks. In September, 1885, however, we reduced our clerical force to one clerk, and in December reduced his wages one-half, besides renting out the banking-house formerly occupied by Bain & Bro., in Portsmouth, for $50 per month, after retaining the use of the vault & office in the rear for ourselves. In settling the accounts due Bain & Bro. by others for guano, bricks, &c., and collecting the notes turned over to us, we found them subject to offsets in a great many cases. Of the transactions reported in our statements there enter into them these offsets, amounting, to May 1st, 1886, to the sum of $23,843.06.

With these statements in regard to our disbursements, the following summary is given:

454	Amount of disbursements		$93,128 77
	Amount allowed in offsets	$23,843 06	
Expense account, taxes, insurance, &c.		16,374 80	
Expenses in carrying on farms of Bain & Bro., repairs of property, burning bricks, &c.		24,393 24	
Expenses of Wallace farms, labor, lien of T. M. Wilson, &c.		19,054 14	
Paid trustees, commissions		9,000 00	
Storage		133 93	
Ground rent, real estate		85 00	
Other incidentals		244 60	
			93,128 77

In the item of $24,393.24 is included all moneys paid out on the Prospect, Kay, Beaton, Moore, and Bowers Hill farms; the expense of burning several kilns of bricks on the O'Neil farm; completing in part three new houses in Portsmouth, which were partly built when we took charge; repairs to property, and such like—all of

which expenditures were absolutely necessary for the protection and preservation of the trust subject. As seen by the amount of money on hand, we have far more than enough to pay all the claims secured to the first-class creditors (after paying all costs and
455 expenses of the trust), which said claims we state to the court as follows:

1. Three notes made by Geo. M. Bain, Jr., held by the Exchange National Bank, $13,000, $9,000, $9,000	$31,000	00
2. Overdraft of Geo. M. Bain, Jr., at said bank	5,823	09
3. Overdraft of Mrs. Annie S. Hall at said bank	5,465	40
4. Wright B. Carney	157	82
5. Joseph T. Duke	122	69
6. W. R. Old	123	11
7. Charles E. Jenkins	189	55
8. Jones, Lee & Co.	5,000	00
9. Jno. T. King & Bro.	1,000	00
10. Clerks of Bain & Bro., not yet definitely ascertained, say	1,000	00
Aggregate	$49,881	61

As to these preferred claims some may be stated to be settled in full or in part by set-offs against them as follows:

W. B. Carney, in part	$128	00
Joseph T. Duke, in full	122	69
W. R. Old, in part	30	00
Charles E. Jenkins, in full	189	55
	$470	24

So that the actual amount required in cash to pay these preferred claims is $49,411.37.

The amount due the clerks of Bain & Bro. is not yet definitely ascertained because of dispute as to the amount due one of them; but as before stated, from the best information we now have, the amount will not exceed $1,000.

We beg leave also to state to the court that upon taking charge of the books of Bain & Bro. we at once advertised for the depositors at the banking-house in Portsmouth to hand in their pass-books
456 to be written up. Many of the depositors held certificates of deposits, but a large majority of them had pass-books, such as are used in the banking business. Upon the return of these books and certificates we had them written up and verified, and after deducting such offsets as we found against some of these depositors (said offsets consisting mainly of bills due Bain & Bro. for guano, bricks, lime, and other merchandise or notes held by Bain & Bro, which were not due at the time of their assignment), we issued a certificate to each depositor whose pass-book had been written up or who returned his certificate of deposit, in the form following:

No. —. OFFICE OF TRUSTEES OF BAIN & BRO.,
PORTSMOUTH, VA., —— 188–.

Upon an examination and verification of the books of Bain & Bro. we find that there is standing to the credit of —— —— the sum of —— dollars — cents, for which he is entitled to a certificate as a depositor secured under the deed of trust to us, dated April 6th, 1885.

$——.

JOHN T. GRIFFIN,
JOHN B. JENKINS,
WM. W. OLD,
Trustees.

457 Across the face of the certificate is printed in red ink the words: "This certificate is not good unless countersigned by one of the trustees. Countersigned."

Upon an examination of the deposit accounts we found 1,023 such accounts, including certificates of deposit, represented by nearly as many depositors, the difference being explained by the fact that some depositors had two or more separate accounts, and that the aggregate amount on the books to the credit of these depositors was $889,637.03. (But this sum may [be] increased by interest on certificates of deposit not yet brought in.)

Up to March 31st, 1886, the accounts of 830 of these depositors had been written up on their pass-books and audited, and we had issued certificates aggregating $770,710.87. This would indicate that there are 193 depositors whose books have not been written up and to whom certificates have not been issued, representing $118,926.16 (although the books of some of these depositors have been written up, but they have not been called for, & therefore no certificate has been issued by us to them).

458 But this does not represent the true state of the account, as we held offsets aggregating $23,843.06, as before stated, against these deposit accounts, some which were in part and some in full of the amounts to the credit of the depositors who claimed such offsets. The sum of $118,926.16 is therefore to be reduced by the said sum of $23,843.06, leaving in fact $95,083.10, and the number of depositors whose deposits in full were liquidated by offsets is 46, so that there are now 147 depositors, representing $95,083.10, to whom certificates have not been issued by us, and this amount will be reduced by additional offsets amounting to about $5,000. The amount due depositors, therefore, liable to be increased by interest on certificates not yet brought in, is as follows:

Amount for which certificates have been issued by the trustees		$770,710 87
Amount for which certificates have not been issued	$95,083 10	
Offsets	5,000 00	
		90,083 10
		$860,793 97

These certificates have not been issued because for the past few months the work of writing up the pass-books as they have
459 been brought in has been virtually at an end, by reason of the fact that all our books have been before the special master in this cause. The books of some are now in our hands, and have not been called for, though ready for delivery, and in some cases the amounts are to the credit of suits and fiduciaries, and it has not been determined in whose names the certificates should be delivered. These latter represent a large amount, one suit representing $13,954.36, and some of the depositors are so far removed from Portsmouth that we suppose that they have neglected to send in their books or have failed to do so from want of information of our desire that they should do so.

And we here take occasion to say that in writing up the pass-books and verifying the certificates we have found that the depositors' accounts on the books of Bain & Bro. have been properly and accurately kept, and have never found a mistake in them. We feel it due to ourselves and all concerned to make this statement, because of the attempt to discredit the correctness of these books in this respect by the special master in his report.

460 As is shown by our report thereof already filed in this cause, we have rented out all the farms under our charge for this year, and have sold the chattel property on the Wallace farms, a part of the purchase-money having been paid and accounted for.

May 1st, 1886.

WM. W. OLD,
JNO. T. GRIFFIN,
JOHN B. JENKINS,
Trustees of Bain & Bro.

461 In the Circuit Court of the United States for the Eastern District of Va.

WM. H. PETERS, Receiver, &c., *vs.* BAIN & BRO. *et als.*

The trustees of Bain & Bro. herewith submit their report of transactions for the month of April, 1886.

JOHN B. JENKINS, *Trustee.*
JNO. T. GRIFFIN, *Trustee.*

462 *Receipts and Disbursements of Trustees of Bain & Bro.*

1886.			1886.		
April —.	To cash disbursed as per statement "K K"	2,805 17	April 1.	By balance	104,104 72
	To balance as per statement L L	106,837 84		" cash collected as per statement J J	5,538 29
		109,643 01			109,643 01

463 *Statement of Balances to Credit of Trustees.*

Citizens' Bank, Norfolk, Va.	32,585 63
Marine Bank, " "	30,933 24
Norfolk Nat'l Bank, Norfolk, Va.	15,412 88
Bank of Commerce, " "	9,656 26
Savings Bank of Norfolk, Norfolk, Va.	1,977 08
Merchants' & Farmers' Bank, Ports., Va.	15,894 39
Bank of Portsmouth, " "	83 49
Cash in office	294 87
	106,837 84

464 *Cash Account Trustees of Bain & Bro. J J.*

1886.		Dr.			
April 1.	To	Balance			104,104 72
" "	"	Farms, R., &c.	564 45		
" "	"	Farms, R., &c.	52 50		
2.	"	Wallace fund (Ferebee)	2,000 00		
" "	"	Farms, R., &c.	107 00		
3.	"	Farms, R., &c.	118 59		
5.	"	Farms, R., &c.	74 92		
9.	"	Farms, R., &c.	25 00		
9.	"	Expense ac., Echols & Colorado mines	52 50		
10.	"	Farms, R., &c.	79 74		
12.	"	Farms, R., &c.	25 00		
14.	"	Farms, R., &c.	15 00		
15.	"	Farms, R., &c.	5		
16.	"	Farms, R., &c.	80		
17.	"	Farms, R., &c.	148 12		
19.	"	Farms, R., &c.	10		
21.	"	Farms, R., &c.	52 50		
22.	"	Farms, R., &c.	12 50		
23.	"	Farms, R., &c.	15 00		
24.	"	Farms, R., &c.	87 25		
26.	"	Farms, R., &c.	73 30		
28.	"	Farms, R., &c.	2 90		
29.	"	Bills rec., No. 24,183	150		
" "	"	Interest on same	8 10		
" "	"	Farms, R., &c.	1,761 57		
30.	"	Expense ac., C. T. Friedlin, ins.	8 35		
" "	"	Farms, R., &c.	9 00		
				5,538 29	

465 *Cash Account Trustees of Bain & Bro. "K K."*

1886.			Cr.		
April	3.	By	Farms, R., &c.	125	38
"	"	"	Expense ac. cleaning office	2	50
"	7.	"	" clerk's salary	75	00
"	10.	"	Farms, R., &c.	46	35
"	17.	"	Farms, R., &c.	38	02
"	"	"	Expense ac. K. C. Murray	140	
"	24.	"	Farms, R., &c.	21	27
"	26.	"	Expense ac., insurance	55	65
"	30.	"	Jno. B. Jenkins	350	
"	"	"	Wm. W. Old	951	
"	"	"	Jno. T. Griffin	1,000	
				2,805	17

466 EXHIBIT "Q."

W. W. Old's Deposition, Question, Cross-Ex., 109.

Bills receivable	5,733 91
Open acs.	19,541 55
Stock-selling price	24,800 34
Timber	1,000 00
Cash	2,451 03
Manchester property	1,202 50
Swamp lands	55,000 00
Personal property	4,684 20
Cost of plant	117,798 74
	232,212 27

Liabilities.

Exchange Nat. Bank	139,101 80
For merchandise	24,979 96
Notes for factory lot	6,720 00
" " machinery	5,339 01
" " "	5,725 53
Notes swamp lands	23,114 30
Electric light	1,032 42
Pay-roll	1,945 97
Capt. stock	7,500 00
Profit and loss	16,753 28
	232,212 27

467 Ex. "X" with deposition of W. W. Old—Q. 28.

(Copy.)

Bain & Bro.'s Real Estate.

Date of purchase according to deed.	Property.	Amo. of purchase-money.
	City:	
August 27, 1860.	Newtown	325
Feb'y 6, 1866.	Jenkins and 6th streets	1,310
3 deeds—1866 & 1867.	Bank building & lot	6,730
June 18, 1867.	Lincoln and 5th streets	835
April 1, 1868.	Peabody Hotel property	5,000
October 28, 1868.	Post office (say)	5,000
March 2, 1868.	Telegraph office	4,100
2 deeds—1 in '68, 1 in '74.	West side of Crawford street	3,050
4 deeds—3 in '68, 1 in '77.	Court and Glasgow	3,630
2 deeds—1 in '68, 1 in '75.	Henry and 6th streets	362 50
2 deeds—1868 & 1869.	Crabb & Crawford streets { 175 / 175 }	350
June 3, 1871.	Sibley property, High street	1,350
2 deeds—1871 & 1874.	Crawford and Queen streets	3,450
September 18, 1871.	County & Middle streets	3,500
May 20, 1871.	East side of 6th street	301
July 17, 1871.	Glasgow & Chestnut streets	250
March 20, 1872.	Leigh property	2,175
August 4, 1874.	West side Dinwiddie street	2,000
April 20, 1874.	{ Glasgow and Dinwiddie streets / Washington & London streets }	1,900
Feb'y 28, 1874.	North side South street	1,200
May —, 1877.	Clifford & Washington streets	1,165
May 4, 1875.	Ocean House ($\frac{1}{10}$)	2,625
Aug't 10, 1875.	North side of High street	1,300
Oct'r 11, 1878.	{ 5th & Henry streets / Henry & Essex streets }	2,810
Feb'y 28, 1878.	Lincoln & 1st streets	726 60
Oct'r 26, 1878.	Skurmick property	300
1878 and 1881.	Etheredge & Brooks' warehouse	4,220
March —, 1879.	O'Conner property	3,984
March 5, 1879.	Joyce property	900
		64,849 10

468

			64,849	10
Nov'r	4, 1881.	West side of Crawford street	3,225	
May	9, 1881.	Clifford & Middle streets	400	
"	"	Middle and Bart streets		
Oct'r	26, 1881.	Holladay property	4,600	
August	18, 1882.	Cherry property	2,305	
March	15, 1884.	King street	1,135	
April	14, 1883.	Mansion House	2,500	
			79,014	10

Any improvements made to any of said real estate.

County:

Nov'r	22, 1859.	Slaughter-house	3,000	
Jan'y	14, 1869.	O'Neil farm, near Portsmouth	16,500	
Aug't	18, 1873.	About 80 acres on Paradise creek	910	
May	30, 1874.	½ of 244 acres near Olive Branch church.	1,958	
Aug't	18, 1875.	$39\frac{6}{4}$ acres on Hodges Ferry road	500	
Jan'y	1, 1875.	91 acres on Paradise creek	1,735	
March	8, 1876.	Lot in Lincolnsville	200	
May	13, 1876.	½ of 1,254 acres on D. S. S. canal	627	
March	8, 1876.	Lot on Carrol street, Norfolk county	200	
May	18, 1877.	81 acres Western branch	2,005	
"	27, 1877.	½ of 85 acres Western branch	1,002	50
Jan'y	3, 1878.	49 acres Eastwood tract $1,500		
"	"	½ of 85 acres Western branch 1,002 50		
			2,502	50
April	28, 1877.	81 acres near Jolliff's church	1,300	
March	30, 1878.	½ of 700 acres near Bowers hill $1,750; 300	2,050	
April	28, 1878.	198 acres on Old Stage road	2,500	
Feb'y	13, 1878.	41 acres Deep Creek road	726	66
Jan.	21, 1879.	93 acres head of Western branch	410	
Oct'r	9, 1879.	110 acres Western branch	3,000	
"	18, 1879.	139 acres on Hodges Ferry road	2,200	
Jan'y	12, 1880.	584 acres Long Point marsh	1,800	
March	18, 1880.	71 acres Western branch	3,075	
Aug't	19, 1881.	62½ acres Paradise creek	500	
Sep'r	24, 1881.	80 acres in Deep Creek township	1,010	
			49,711	66

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			49,711	66
Jan'y	31, 1881.	100 acres head Western branch	1,275	
March,	17, 1881.	200 acres mill tract	742	
July	29, 1881.	12 acres Whitehead's island (say)	120	

April	25, 1882.	About 39 acres Martin tract	3,525
"	13, 1883.	½ of 250 acres near Blackwater, Princess Anne Co.	275
		Four patents from Commonwealth:	
July	16, 1880.	No consideration.	
March	4, 1880.	"	
"	4, 1880.	"	
May	8, 1880.	"	
May	4, 1868.	Ontonagon county, Michigan	645
March	17, 1882.	½ interest lot Franklin, Va.	750
April	24, 1882.	½ " " "	162 50
			57,206 16
		Any improvements to or personal property on any of said real estate.	
		Lands conveyed to Bain & Bro. by Wallace & Son and wives:	
April	4, 1885.	2,500 acres Dover tract	
		140 " Lower Glencoe	
		250 " Wild Horse ridge	
		3,000 " Bally Hack tract	
		40 " near Bally Hack tract	
		160 " Wilkins farm	151,800 00
		6,090	
		Lot near Portsmouth	
		Lots in Brambleton	
		Personal property	
		Lots in Berkley	

(Besides the above consideration, expressed in the deed, about $12,000 of liens on the property was assumed and the claims of the employees of Wallace & Son and George T. Wallace.)

470 *Geo. M. Bain's, Jr., Property.*

Date of purchase according to deed.		Property.	Amo. of purchase-money.
July	17, 1871.	High, between Court and Dinwiddie	4,300
Jan'y	1, 1867.	Corner North & Washington streets	6,000
March	28, 1874.	Newtown	100
Oct'r	28, 1868.	Court street	4,000
March	8, 1883.	High street, near post office	3,010
		½ interest in ½ square Gosport (say)	600
		Glasgow street extended (say)	250
		Meigs' lot	300
		⅐th interest in real estate left by his father (say).	1,043
			19,603

——	—, 1884.	Int. in Colorado mining property (deeds not in hand).	
		Furniture or any improvements to any of said property.	

R. T. K. Bain's Property.

Nov'r	8, 1876.	Court street	2,410
Dec'r	16, 1873.	Court and North streets	2,050
April	28, 1860.	Court, between London and Glasgow.	1,800
Nov'r	3, 1873.	Green street	600
March	30, 1878.	Residence Norfolk county (say)	5,000
Sep'r	13, 1881.	House and lot adjoining	4,000
		$\frac{1}{7}$th interest in real estate left by his father (say).	1,043
			16,903
		Furniture or any improvements to any of said property.	

James G. Bain's Property.

Jan'y	23, 1866.	Washington street	4,000
June	3, 1875.	Corner Washington & Glasgow streets.	925
Dec'r	10, 1860.	In Newtown	447 83
		$\frac{1}{7}$th interest in real estate left by his father (say).	1,043
			6,415 83
		Furniture or any improvements to any of said property.	

471 *List of Stocks, Bonds, and Securities.*

		Par value.	Present estimated value.
45 shares	Norfolk & Portsmouth warehouse	50	00
122 "	Franklin Bank	100	00
86 "	Portsmouth Insurance Company	25	2,150
144 "	Norfolk & Ocean View R. R. Co.	50	7,200
79 $\frac{1}{2}$ "	Albemarle Swamp Land Company	100	1,977
10 "	Norfolk College for Young Ladies	50	50
5 bonds	Ocean House, hotel	100	250
1 share	International Cotton Exposition	100	00
1 "	Seaboard & Roanoke R. R. Co.	100	150
39 "	Dismal Swamp Canal Company	100	975
246 "	Greenville Land & Lumber Co.	100	00
35 "	Western Branch Drawbridge Co.	50	1,750
10 "	Portsmouth Gas Company	50	500
Va. interest certificates	120		
W. Va. "	600 54		
Va. fractional currency bonds	384 13		
W. Va. certificates—additional	1,582		
		2,687 06	250

625 shares Chesapeake & Idaho Gold & Silver Mining Company	50	00
6,114 shares Norfolk & Ouray Mining Co., as appears by the books of the company, all of the scrip not being in our hands	----	00

[Endorsed:] Exhibit "X" with W. W. Old's deposition—Q. 28. (Copy.)

472 In the Circuit Court of the U. S. for the Eastern District of Va.

W. W. OLD, JOHN T. GRIFFIN, & JOHN B. JENKINS, Trustees,

vs.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Va., & Others.

On the motion of W. W. Old, John T. Griffin, & John B. Jenkins, trustees, by their counsel, leave is given them to file their cross-bill in the chancery suit of Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va., against them & others, & the same is accordingly done.

Norfolk, 16th July, 1885.

RO. W. HUGHES, *Judge.*

473 In the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

To the honorable Hugh L. Bond and Robert W. Hughes, judges of said court:

Wm. W. Old, John T. Griffin and John B. Jenkins, trustees, as hereinafter set out, bring this their bill against Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va., Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners doing business under the name and style of Bain & Bro., and also as constituting the present firm of Bain & Bro.; Robert T. K. Bain and Fanny S. Bain, his wife; George M. Bain, Jr., and Willie F. C. Bain, his wife; James G. Bain, and Emily his wife; Annie S. Hall, Wright B. Carney, Joseph T. Duke, W. R. Old, Charles E. Jenkins, Jones, Lee & Co., John T. King & Bro.; the employees of of Bain & Bro., of George T. Wallace, and of Wallace & Son, to the plaintiffs unknown; and the said George T. Wallace and John G. Wallace, individually and as partners, trading under the name and style of Wallace & Son; and all the depositors of said Bain & Bro.; at their banking house in the city of Portsmouth; and George Tait, Alexander & Powell, Riddick & Richardson, and Furman & Page, and all others the creditors of the grantors mentioned as secured in the deed of trust hereinafter referred to, defendants.

I. And thereupon your orators complain and say that they, with others, are defendants in a certain suit in equity now depend-

474 ing in this honorable court, wherein the said William H. Peters, receiver of the said Exchange National Bank is plaintiff; that as such defendants they have filed their joint and several answer to said plaintiff's bill, and such proceedings have been had in said suit that by an order entered therein on the 12th day of May, A. D., 1885, a certain restraining order theretofore issued against your orators was vacated and discharged, and a certain motion for the appointment of a receiver was overruled and denied, and by their consent your orators were directed to make monthly reports to this honorable court of their transactions under the deed of trust in the bill and proceedings mentioned, a copy of which said deed is herewith filed as "Exhibit A" and prayed to be taken as a part of this bill.

II. And your orators further show that by said deed there was conveyed to them the assets and property of every kind, real, personal and mixed, of the former copartnership of Bain & Bro., composed of Robert T. K. Bain, George M. Bain, Jr., James G. Bain, and Thomas A. Bain (the latter deceased), and of the present copartnership of Bain & Bro., composed of the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, and of the individual members of the said present copartnership; and that some of the debts mentioned and secured by the said deed are debts of the individual members of the said present copartnership.

III. And your orators further show that much of the real estate belonging to the former copartnership of Bain & Bro. and the present copartnership of Bain & Bro. stands in the names of the individual members of said copartnerships, or of some of them, although they are also informed and believe that some of the real estate standing in the names of the said individual members be-

475 longs to them individually; but as to what part of such real estate is partnership property and what individual property your orators are not accurately informed and do not know; and they are advised that it is proper, in the execution of their trust, that they should have full and complete knowledge in respect to said copartnership and individual property; and that, in view of the interests involved, and for their own protection, the same should be obtained through the intervention of a court of equity.

IV. And your orators further show that they will have in hand within a very short time, and during the month of July, 1885, sufficient trust funds to pay the first preferred debts under the said deed, but they are advised that the indebtedness to the Exchange National Bank, being that first mentioned in said class and amounting to between forty and fifty thousand dollars, should not be paid by them, and that the receiver of the said bank in attacking the said deed has estopped himself from claiming the said indebtedness or any benefit or advantage whatsoever under the said deed, and your orators ask the direction of the court in the premises. Any question as to the application of the particular funds in hand, or any part thereof, to the payment of debts in said first preferred class due by individual members of the firm, can be hereafter readily adjusted

in the administration of the trust & when sale is made of the property of the individual members.

V. Your orators, therefore, in view of the premises, besides reporting to this honorable court their transactions, as required by the said order of May 12th, 1885, desire the aid and direction of this honorable court in the ascertainment of all and every the copartnership property and the individual property standing in the names of the individual members of the said copartnerships, or any of said members; and in the application of the trust funds to the payment of the debts secured; and in the administration of this their trust; and they are advised that it is their right and privi-
476 lege to file this their bill and to apply to this honorable court as a court of equity for the purpose aforesaid.

In consideration whereof, and forasmuch as your orators are remediless in the premises except by the aid of a court of equity, where matters of this sort are properly and especially cognizable and relievable, your orators pray that they may have leave to file this their cross-bill in the said suit of Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va., against them and others; that the said Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va., Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners doing business under the name and style of Bain & Bro., and also as constituting the present firm of Bain & Bro.; Robert T. K. Bain, and Fanny S. Bain, his wife; George M. Bain, Jr., and Willie F. C. Bain, his wife; James G. Bain, and Emily, his wife; Annie S. Hall, Wright B. Carney, Joseph T. Duke, W. R. Old, Charles E. Jenkins, Jones, Lee & Co., John T. King & Bro.; the employees of Bain & Bro., of George T. Wallace and of Wallace & Son, to the plaintiffs unknown; and the said George T. Wallace and John G. Wallace, individually and as partners trading under the name and style of Wallace & Son; and all the depositors of the said firm of Bain & Bro. at their banking-house in the city of Portsmouth and George Tait, Alexander & Powell, Riddick & Richardson, and Furman Page, and all others the creditors of the grantors mentioned as secured in the deed of trust hereinbefore referred to may be made parties defendant to this bill and required to answer the same, the plaintiffs, however, waiv-
ing answers under oath, except as to the discovery hereinafter
477 sought from the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain; that the said Robert T. K. Bain, Geo. M. Bain, Jr., and James G. Bain may make a full and true discovery of all the partnership real estate belonging to the former firm of Bain & Bro., and to the present firm of Bain & Bro., which stands in the names of the individual members of said firms, or any of them, and of the real estate belonging to the individual members of the said present firm of Bain & Bro.; that they may receive the aid and direction of this honorable court in the application of the trust funds under the said deed of trust to the payment of the debts secured by said deed, as well as in the administration generally of their said trust, and as to any and all questions that may arise

therein; that all proper accounts may be ordered and may be taken before a master of this court in the administration of the said trust; and that your orators may have all such other and further relief in the premises, both general and special, as the nature of their case may require or to equity shall seem meet.

And your orators will ever pray, &c.

WM. W. OLD,
JOHN B. JENKINS,
JNO. T. GRIFFIN,
Trustees, &c.

JAS. ALFRED JONES,
LEGH R. PAGE,
RICHARD WALKE,
Counsel.

478 EXHIBIT A.

Trust. Robert T. K. Bain et als. to John T. Griffin et als., Trustees.

This deed, made this the 6th day of April, in the year 1885, between Robt. T. K. Bain, George M. Bain, Jr., and James G. Bain, both as surviving partners of themselves and Thomas A. Bain, deceased, late bankers and partners, doing business under the name and style of Bain & Bro., and also as constituting the existing copartnership of Bain & Bro., and the said Robert T. K. Bain and Fannie T., his wife; George M. Bain, Jr., and Willy F. C., his wife, and James G. Bain and Emily, his wife, all of the city of Portsmouth, in the State of Virginia, parties of the first part, and John T. Griffin, Wm. W. Old, and John B. Jenkins, trustees, chosen for the purposes hereinafter named, parties of the second part, witnesseth:

That the said parties of the first part do grant unto the said parties of the second part all and singular the following property, to wit: All the assets and property of every kind whatsoever, real, personal, and mixed, both of the said late copartnership of Bain & Bro., composed as aforesaid of the said Robert T. K. Bain, George M. Bain, Jr., James G. Bain, and Thomas A. Bain, deceased, and of the present copartnership of Bain & Bro., composed of the said Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, including all the notes, bonds, bills, accounts, credits, stocks, moneys, office furniture, farming implements and utensils, horses, mules, wagons, carts, trucks, and all other personal property of every kind and description whatsoever, whether standing in the name of Bain & Bro. or of any or either of the said parties as individuals, and including all of the real estate wherever situated, whether standing in the name of Bain & Bro. or of any of the partners either of the old firm or of the present firm of Bain & Bro.; also all the real estate standing in the name of or belonging to the said Robt. T. K. Bain, either at law or in equity, situated in the city of Portsmouth, in the county of Norfolk, in the county of Nansemond, in the county of Southampton, in the county of Princess Anne, or wherever else situated, it being the object and intention to embrace and include all and every part of the real estate standing in the name of the said Robert T. K. Bain or to which

he is entitled at law or in equity wherever situated; also all the personal property of the said Robt. T. K. Bain of every kind, character, and description whatsoever, wherever found; also all the real estate standing in the name of or belonging to the said George M. Bain, Jr., either at law or in equity, whether situated in the city of Portsmouth or the county of Norfolk or elsewhere; and also all the personal property of the said George M. Bain, Jr., of every kind, character, and description whatsoever wherever found; also all the real estate standing in the name of or belonging to the said James G. Bain, either at law or in equity, whether situated in the city of Portsmouth or the county of Norfolk or elsewhere; and also all the personal property of the said James G. Bain of every kind, character,
479 and description whatsoever wherever found, it being the object and intention of this deed to convey all the property of every kind whatsoever, real, personal, and mixed, wherever situated or found, of the late firm of Bain & Bro., of the present firm of Bain & Bro., and of the individual members of the said present firm of Bain & Bro., in trust, to secure the costs and expenses of this trust, including commissions, to the said trustees of five per centum upon the amount of sales or of the moneys which shall come to the hands of the said trustees from sales or otherwise, and the fees of counsel in and about the preparation and execution of this deed, if they shall remain unpaid at its delivery; and after the payment thereof to secure—first, three notes of George M. Bain, Jr., as maker alone, held by the Exchange National Bank, of Norfolk, Va., the overdraft of the said George M. Bain, Jr., at said bank, and the overdraft of Mrs. Annie S. Hall at said bank, and to the following depositors of Bain & Bro. the amounts of their several respective deposits, as follows: To Wright B. Carney, $159.82; to Joseph T. Duke, $122.69; to W. R. Old, $123.11, and to Charles E. Jenkins, $189.55, the said Bain & Bro. having held notes of the said depositors for amounts larger than the said several respective deposits, which said notes have been rediscounted and are held by other parties, thereby preventing the said depositors from using their said deposits as offsets *pro tanto* for said notes, and to Jones, Lee & Co. the sum of $5,000 and John T. King & Bro. the sum of $1,000 on account of their several respective deposits, the said two last-named depositors having given their notes to the said Bain & Bro. for said amounts respectively, which said notes also have been rediscounted, thereby preventing said depositors from using so much of their said deposits as an offset thereto; also all the clerks and other employés of Bain & Bro., and all their servants and laborers, or the servants and laborers of either member of said firm, the amount or amounts due them respectively when this deed takes effect; also all the employees and laborers of George T. Wallace, or of Wallace & Son, the amount or amounts due them respectively when this deed takes effect; and after the payment of the hereinbefore-mentioned sums and claims to secure, secondly, the following creditors, to be paid equally and ratably if the property hereby conveyed shall be insufficient to pay them all, but with the privilege as to bidding on such property as may be sold at auction as hereinafter provided, viz: All the depositors of the said firm of

Bain & Bro. at their banking-house in the city of Portsmouth for the amount and amounts due them as shown by the books of the said firm, and George Tait, Alexander & Powell, Riddick & Richardson, and Furman & Page the amount or amounts due them respectively, either by Bain & Bro. or by either member of said firm; also any debt or liability contracted by Bain & Bro., or any member of said firm individually, for groceries, dry goods, and other household supplies; also the notes of the Greenville Land and Lumber Company, aggregating $102,000, now held by the Exchange National Bank of Norfolk, Va., and also to the Mapes Formula and Peruvian Guano Company the amount due it on account of guano sold and unaccounted for by R. T. K. Bain, agent. And after the payment in full of all the claims in the second class just above enumerated then to secure the Exchange National Bank of Norfolk the amount due it by the said firm or its individual members. And the said trustees, for the purpose of executing this trust, shall at once take charge of all the property and effects hereby conveyed, and make an inventory thereof, and proceed to collect the choses in action and all evidences of indebtedness, and to convert the real and other personal property into cash as soon as possible, and they may make sale of the real and personal estate hereby conveyed, at public auction or private sale, at such time or times and place or places and after such notice as to them shall seem best, and they may make such sale
480 upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the second class above enumerated shall have the right to purchase any part or parcel of said property so sold and pay the said trustees therefor at its full face value the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase money, and to enable as many creditors as possible to become bidders on these terms the said trustees may have the real estate hereby conveyed, or any part thereof, laid off into lots or parcels, as they may think best. And upon the conversion of the said property hereby conveyed into money the said trustees shall distribute the same to the creditors hereby secured in the order hereinbefore named with all diligence, and in the distribution between those creditors who may have purchased property and paid for the same under the provisions of this deed with a part of the sums found due them respectively and those who made no purchase the trustees shall observe such rule of equality as will be just and proper. And the said trustees are authorized and empowered to employ all such agents, attorneys, or laborers as may be necessary for the preservation, protection, handling, shipping, or cultivation of the property hereby conveyed, in such manner as shall be for the interest of all concerned, and do all things necessary for the cultivation, saving, or shipping the crops now growing or which may be planted on any of the lands hereby conveyed, for the present year, and in case any of said country lands shall remain unsold during the present year, to make such arrangements or contracts for their cultivation until sold as shall seem best,

the charges, costs, and expenses of all which shall be charged as a part of the expenses of this trust. And the said parties of the first part do hereby warrant generally the property hereby conveyed.

Witness the following signatures and seals.

(Signed) ROBT. T. K. BAIN. [SEAL.]
FANNY T. BAIN. [SEAL.]
GEO. M. BAIN, JR. [SEAL.]
WILLIE F. C. BAIN. [SEAL.]
JAMES G. BAIN. [SEAL.]
EMILY BAIN. [SEAL.]
WM. W. OLD, *Trustee.* [SEAL.]

The words on page three on the margin to be interlined on line 5 of said page "Three notes of Geo. M. Bain, Jr., as maker alone held by the Exchange National Bank, of Norfolk, Va., the overdraft of the said Geo. M. Bain, Jr., at said bank, and the overdraft of Mrs. Annie S. Hall at said bank, and" were written upon the margin of page 3 before the execution and acknowledgment of this deed.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA, *County of Norfolk,* } *To wit:*

I, Norman Cassell, a notary public for the county of Norfolk, in the State of Virginia, do certify that Robt. T. K. Bain, whose name is signed to the writing above, bearing date on the 6th day of April, 1885, has acknowledged the same before me in the county aforesaid.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

481 STATE OF VIRGINIA, *County of Norfolk,* } *To wit:*

I, Norman Cassell, a notary public for the county of Norfolk, in the State of Virginia, do certify that Fanny T. Bain, the wife of Robt. T. K. Bain, whose names are signed to the writing above, bearing date on the 6th day of April, in the year 1885, personally [appeared] before me in the county aforesaid, and being examined by me privily and apart from her said husband, and having the writing aforesaid fully explained to her, she, the said Fanny T. Bain, acknowledged the said writing to be her act and deed, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA, *City of Portsmouth,* } *To wit:*

I, Norman Cassell, a notary public for the city of Portsmouth, in the State of Virginia, do certify that Geo. M. Bain, Jr., and James G. Bain, whose names are signed to the writing above bearing date

on the sixth day of April, in the year 1885, have acknowledged the same before me in the city aforesaid.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

STATE OF VIRGINIA,
City of Portsmouth, } *To wit:*

I, Norman Cassell, a notary public for the city of Portsmouth, in the State of Virginia, do certify that Willie F. C. Bain, the wife of Geo. M. Bain, Jr., and Emily Bain, the wife of James G. Bain, whose names are signed to the writing above bearing date on the 6th day of April, in the year 1885, personally appeared before me, in my city aforesaid, and being examined by me privily and apart from their respective husbands, and having the writing above fully explained to them, they, the said Willie F. C. Bain and Emily Bain, acknowledged the said writing to be their act and deed, and declared that they had willingly executed the same and do not wish to retract it.

Given under my hand this 6th day of April, in the year 1885.

NORMAN CASSELL,
Notary Public.

VIRGINIA:

In the clerk's office of the court of hustings for the city of Portsmouth, on the 6th day of April, 1885, this deed was acknowledged before me by Wm. W. Old, trustee, and, together with the certificate annexed, admitted to record.

Teste: C. T. PHILLIPS, *C. C.*

A copy.
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A. W. HARVEY, *D. C.*

482 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. W. OLD, JOHN T. GRIFFIN, and JOHN B. JENKINS, Trustees, &c., Plaintiffs,

vs.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, and Others, Defendants.

The answer of William H. Peters, receiver of the Exchange National Bank of Norfolk, to a bill of complaint exhibited against him as such receiver, and others, defendants, by William W. Old, John T. Griffin, and John B. Jenkins, trustees as therein mentioned, plaintiffs, in the circuit court of the United States for the eastern district of Virginia, which said bill the plaintiffs therein pray to be allowed to file as a cross-bill in the suit of Wm. H. Peters, receiver, against the said Wm. W. Old, John T. Griffin, and John B. Jenkins, trustees, and Bain & Bro. and others, pending in said court.

This defendant, reserving unto himself the benefit and advantage of exception or otherwise to the said bill for its many errors

483 and insufficiencies of law and fact, for answer thereto, or to so much thereof as he is advised it is material for him to make answer unto, answering, says:

I. That the matters alleged in the first paragraph of the said proposed cross-bill are true, and the matters alleged in the second paragraph of said proposed cross-bill are true, but it is also true that the validity of said deed of conveyance to them as trustees, in the said second paragraph mentioned, is in controversy in the suit of Wm. H. Peters, receiver, against the said trustees of Bain & Bro., now pending in this court.

And it is true, as alleged in the third paragraph of said cross-bill, that much of the real estate of the firm of Bain & Bro. stands in the names of the individual members thereof, and it may also be true that some of the real estate standing in the names of said individual members belongs to them individually; but as to what part of the said real estate is partnership property and what individual property this defendant says that this is also the subject of inquiry in the original and amended bills filed by William H. Peters
484 against the said Bain & Bro. and their trustees, in which said bills a full discovery is sought from the said Bain & Bro. of their title as a firm and as individuals to said real estate.

That the said cross-bill is, for that reason, unnecessary, as the said trustees are parties to the aforesaid suit; and, if answers to the interrogatories therein filed are truly made, they will obtain all the information they can desire as to such title in case they should continue to administer their trusts under the direction of this honorable court, as required by the order of the 12th day of May, 1885, entered in the suit aforesaid.

II. That the allegations of the plaintiffs in the fourth paragraph of the said cross-bill as to the sufficiency of funds now in their hands to pay the first preferred debts under the said deed of trust are true, but it is also true that the said trustees, by the order of this court, are forbidden to pay any creditors named in the said deed of trust without leave of court after notice to this defendant.

This defendant denies all the other allegations of the said fourth paragraph of the said cross-bill. It is not true, as alleged, that the receiver has estopped himself from claiming the bene-
485 fit of the preference which is provided in said deed for the Exchange National Bank of Norfolk in case the said deed should be held valid; on the contrary thereof, he is advised and insists that, without forfeiting any right he might claim under said deed in case no question were raised as to its validity, he has the right to have inquiry made by this honorable court into the *bona fides* thereof, and to require that its validity, as a security for the vast amount of debt which is sought to be preferred to much the larger portion of the debts due by the grantors therein to the Exchange National Bank, shall be passed upon by the court.

This defendant, further answering, says that he is advised that the only question of estoppel properly arising in this case is whether or not the said trustees are estopped, as he insists they are, by their answer to the said original bill in the suit aforesaid, from setting up

any such matter by their cross-bill, or otherwise, having in their said answer admitted that the said debts due the said bank are properly secured in the first class of preferred debts and having alleged, as a reason for the validity of the said deed of trust, that the
486 creditors secured in the first class in said deed are to be first paid by them, and that there are sufficient assets to pay them without having to resort to the sale of any property conveyed by said deed, and, having so answered, they are not to be heard to allege, inconsistently, as in their cross-bill, that the said debts are not to be paid in any event.

And this defendant says that the said cross-bill is improper and unnecessary, so far as the matter alleged in the fifth paragraph thereof is concerned, for the reason that the direction of this honorable court in the ascertainment of the social and individual assets of the grantors in the deed of trust aforesaid, and in the application of the trust fund, and in the administration of their trust has been expressly invoked and acted upon by them in the suit of William H. Peters, receiver, against the said trustees of Bain & Bro.; and all the relief prayed for by them in said cross-bill, in case the said deed is decreed to be *bona fide* and valid, can be more easily and properly afforded them in said suit than in any other proceeding.

487 And, having fully answered, this defendant prays to be hence dismissed with his reasonable costs.

And he will ever pray, &c.

WM. H. PETERS,
Receiver of Exchange National Bank of Norfolk.

T. S. GARNETT, *Of Counsel.*

488 In the Circuit Court of the United States for the Eastern District of Virginia.

WM. W. OLD, JOHN T. GRIFFIN, and JOHN B. JENKINS, Trustees, Plaintiffs,

vs.

WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, and Others, Defendants.

The replication of Wm. W. Old, John T. Griffin, and John B. Jenkins, trustees, complainants, to the answer of Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va., defendant in the above-entitled cause.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto
489 by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and

sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

JAMES ALFRED JONES,
LEGH R. PAGE,
RICHARD WALKE,
Complainants' Solicitors.

490 *Opinion of the Court. Filed June* 7, 1886.

Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk,
vs.
ROBERT T. K. BAIN and Others.

WAITE, *Chief Justice:*

This is a suit in equity begun by the receiver of the Exchange National Bank of Norfolk, an insolvent national bank, for a two-fold purpose—that is to say: 1. To set aside an assignment made by the partnership firm of Bain & Bro. and the several members thereof for the benefit of their creditors, and to subject the assigned property to the payment of debts due the banks; and, 2, to charge property in the hands of the assignees with the trust in favor of the bank because it was bought with moneys of the bank which certain members of the firm, who were officers of the bank, had wrongfully used for that purpose.

The material facts are these: The Exchange National Bank was organized May 13th, 1865, with a capital of $100,000, which was increased November 13th, 1866, to $150,000. Its place of business was Norfolk, Va.

The firm of Bain & Bro., composed originally of R. T. K. and James G. Bain, began business in Portsmouth, Va., as brokers and private bankers in September, 1865, with an assumed capital of $5,000, placed to the credit of the two partners on the books. George M. Bain, Jr., was admitted as a partner soon after the business was started and Thomas A. Bain in 1868 or 1869, but he died in 1877. The capital was never increased, but, on the contrary, the drafts of the partners soon exhausted the original credits and much more besides. At the time of the failure the balances against the partners respectively, were as follows:

James G. Bain	$54,796 73
R. T. K. Bain	47,369 23
George M. Bain, Jr.	7,146 39
Thomas A. Bain's estate	20,028 41
In all	$120,340 76

Portsmouth is separated from Norfolk by the Elizabeth river, one place being on one side of the river and the other immediately opposite on the other. On the 7th of July, 1870, the firm became shareholders in the bank, and the next day George M. Bain, Jr., was elected cashier. This office he held until April 2d, 1885. R. T. K. Bain was elected a director January 2, 1872, and he served in that capacity all the time thereafter during the existence of the bank. James G. Bain was elected assistant cashier August 11th, 1873, and he held that office until January 11th, 1881, when he was made vice-president, in which capacity he acted until the end. Thomas A. Bain was elected a director January 11th, 1876, and this office he held until his death.

On the 9th of September, 1873, the capital stock of the bank was increased from $150,000 to $200,000. The names of the subscribers are not given and no money was paid on that day, but the whole amount of $50,000 was carried in the receiving teller's cash as a cash item until October 14, 1873, when the following parties gave their checks on the bank for the following amounts:

Bain & Bro.	$25,000
John B. Whitehead	15,000
James H. Toomer	5,000
George M. Bain, Jr.	5,000
In all	$50,000

Certificates of stock were issued to these parties, respectfully, for the shares represented by their several checks. On the 10th of May, 1874, the stock was increased to $300,000, R. H. McDonald, of California taking and paying for the whole of the additional amount.

At the time of the failure of the bank the following persons held shares as follows:

Bain & Bro.	582	shares.
George M. Bain, Jr.	232	do.
James G. Bain	91	do.
R. T. K. Bain	91	do.
Thos. A. Bain's estate	91	do.
George M. Bain, Jr., and John B. Whitehead	100	do.
In all	1,187	do.

Very soon after Bain & Bro. became connected with the bank they began to absorb its funds. As they wanted money they got it with or without security, as was most convenient for them. They had no direct connection in their own private banking business with the Bankers' Clearing-house at Norfolk, but they were represented in that association by the Exchange Bank, which paid all balances against them, and these at some times amounted to very large sums. The commercial and business paper which they took at their banking-house in Portsmouth was largely rediscounted for them at the

bank, and on the 31st of March, 1885, their indebtedness to the bank has been stated approximately as follows:

Bain & Bro.'s notes, &c., unendorsed and unsecured	$800,000 00
Notes of others endorsed by them	593,251 99
Cash tickets	211 00
Bain & Bro.'s notes endorsed by bank and discounted in New York	50,000 00
In all	$1,443,462 99

In addition to this George M. Bain, Jr., and James G. Bain each owed the bank very considerable sums. Such being the condition of affairs, the Comptroller of the Currency required the bank to reduce at once the unsecured debt of Bain & Bros. and to make good the deficiency in its reserve fund. In consequence of this the firm, on the 31st of March, sold to the bank the following stocks and bonds:

Seaboard Compress Company stocks	$300,000
Meherrin Valley railroad bonds	200,000
Southern telegraph bonds, of the par value of $140,000, at	70,000
In all	$570,000

And guaranteed that the same should yield the amount for which they were taken whenever put on the market and sold. This guarantee was secured by a transfer of the interest of the firm in the Richmond Cedar Works, and also in $80,000 of Southern telegraph bonds held as collateral security. This being done, and the firm also agreeing not to assign their other property for the benefit of creditors with preferences against the bank, notes of the firm and other indebtedness to the amount agreed on as the value of the stocks and bonds were surrendered and the unsecured debt thereby nominally reduced. While some of the stocks and bonds thus transferred had been before that time in the possession of the bank or some of its officers, the evidence does not establish the fact that they had been in any way pledged, or that they could be legally held by the bank as security. They were all, so far as appears, the property of the firm free of any specific claim of the bank. The value of the stocks and bonds thus transferred falls between two and three hundred thousand dollars short of the amount for which they were taken, and the Richmond Cedar Works stock and Southern telegraph bonds held as collateral to the guaranty against this deficiency are of but little value.

What was thus done did not satisfy the comptroller, and on the 2d of April, 1885, he took possession of the bank for the purpose of winding up its affairs. The banking-house in Portsmouth closed its doors at the same time. This produced great excitement both in Portsmouth and Norfolk, and resulted in the assignment which is now attacked. Mr. Old, one of the assignees, is an attorney-at-law, and was retained as counsel for the firm. He advised them in all

their matters and drafted the assignment. He was informed of the agreement which has been made not to assign with preferences against the bank, and knew generally of the large indebtedness of the firm and of its members to the bank. He also knew of the transaction between the bank and the firm on the 31st of March, and hearing that it was the intention of the creditors of the bank to enjoin the assignment he made haste to have it executed and recorded before anything of that kind was done.

The actual value of the property which passed by the assignment does not exceed five hundred thousand dollars. The property consists very largely of real estate in Portsmouth and Norfolk county, the title to most of which was in R. T. K. Bain. The books of the firm are entirely unreliable. In fact, no general ledger was ever kept, and transactions to enormous amounts can only be traced by memoranda on slips of paper with the help of the explanations of R. T. K. Bain, who was the principal manager. No accounts at all were kept with the bank, and everything, so far as Bain & Bro. were concerned, was found in the greatest confusion.

After the death of Thomas A. Bain the business of the firm was conducted in all respects as it had been before. The indebtedness of the firm to depositors and otherwise at the time of the failure has not been accurately determined, but claims of depositors have already been proved against the trust to more than $750,000, and it is not unlikely that the entire indebtedness, other than that to the bank, may approach a million of dollars.

The money received by the firm from the bank was generally mingled with that which was got from other sources, and it has been impossible to trace it directly into property now in the hands of the assignees, except in the following cases:

Real Estate.

1.	Inventory No. 22, bought May, 1876	$650 00
2.	Inventory No. 50, bought September, 1881	500 00
3.	Inventory No. 58, bought April, 1884	1,137 45
4.	Inventory Nos. 65, 66, 67, bought August, 1881, and October, 1882, $768.34 and $1,865.16	2,633 50

Colorado Mines.

5.	Boomerang, bought August 30, 1884	16,333 00
6.	Laura Dunmore, bought August 4, 1884	5,000 00

Personality.

7.	Dismal Swamp canal bond, bought December, 1880	2,100 00
8.	Seaboard and Roanoke Railroad Co.'s stock, 1 share, bought about 1879	90 00
9.	Ocean View railroad and hotel stock, 122 shares, bought October, 1880	6,100 00
10.	Chesapeake and Idaho Gold and Silver Mining Co.'s stock, 625 shares, bought after 1881	7,812 00

11. Guano "ex. Mt. Edgecomb," paid for by Exchange National Bank February 15, 1884, $59,725.97, part thereof on hand April 6th, 1885, and other parts in open accounts due for sales thereof	15,034 51
12. Norfolk and Ouray Mining Co.'s stock, 6,114 shares, whereof the assignees hold 3,602 shares, which cost $25 per share	90,050 00
13. Personal estate of Jas. G. Bain	1,931 25

As to the trust resulting to the bank by reason of the wrongful and unlawful use of its funds by its officers in the purchase of property for the firm or the several members thereof, this branch of the case divides itself into two parts, the first relating to property which was purchased with moneys that can be identified as belonging to the bank; and, second, to that which was bought and paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully taken from the bank.

As to the first of these classes of property we entertain no doubt that the trust exists, and that it may be enforced by the receiver unless the assignees of Bain & Bro. occupy the position of *bona fide* purchasers for a valuable consideration without notice. The evidence shows beyond doubt that the affairs of the bank were managed almost exclusively by the members of the firm. The funds of the bank were under the immediate control of its officers and agents, and consequently as its trustees. These funds were converted by them regardless of their duty as trustees into this particular property, which still exists in specie. No money was used in these purchases other than such as was taken directly from the bank for that purpose. Under these circumstances the property stands in the place of the money used, and it might have been reclaimed by the bank at its election any time before the rights of innocent third parties intervened. This is elementary. The receiver succeeded to the rights of the bank in this particular.

The property in the second class, however, occupies a different position. There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that when the property in this class was purchased the firm had in its possession any of the moneys of the bank

that could be reclaimed in specie. To give a *cestui que trust* the benefit of purchases by his trustee, it must be satisfactorily shown that they were actually made with the trust funds.

491 In Virginia an assignee for the benefit of creditors is deemed a purchaser for a valuable consideration. This, it is conceded, has been established by a long line of judicial decisions, and is now a rule of property in that State. As such it is binding on us as authority, but, we think, in this case the assignees are chargeable with notice of the equities of the bank. They may not have had actual knowledge of the wrongful conversion of the moneys of the bank into the property which has now been identified as such, but it is clear that Mr. Old, who alone of the assignees was present during the negotiations which preceded the assignment, had full notice of the confusion which existed in the affairs of the bank, as well as those of the firm, and of the intimate relations which for a long time existed between the two institutions. The assignment was hastened to prevent further complications, and we have no hesitation in holding that the assignees took title subject to any equities that might be found to exist in favor of the bank. They were put on inquiry, which they avoided to save what they could. Under these circumstances we hold that the receiver is entitled to a surrender by the assignees of such of the property which it is found had actually been purchased with the moneys of the bank as he elects to take, but of no other.

2. As to the assignment. By a statute of Virginia a creditor may file a bill to set aside a conveyance by his debtor on the ground of fraud without having first obtained a judgment. This suit was, therefore, properly brought. We find no evidence whatever of any actual fraudulent intent on the part of the firm, or either of the parties, to hinder and delay their creditor. They devoted all their property, partnership and individual, of every kind to the payment of their debts. Nothing whatever was kept back. It is true some creditors were preferred over others, but this is allowable in Virginia. From the case of Skipwith's Executor *vs.* Cunningham, 8 Leigh, 271, decided in 1837, until now such has been the recognized law of the State, and this was conceded in the argument.

It is a matter of no importance in this connection that the debt to the bank was created by fraud or that the assignors were shareholders in the bank and liable as such to assessments by the Comptroller of the Currency to meet its debts. Fraud in the creation of an unpreferred debt is not ground for setting aside an assignment for the benefit of creditors which is otherwise valid, and the shareholder of an intestate bank is no more prohibited from preferring creditors as against his liability in that capacity than he is against any one else that he owes. The assignment does not in any respect change the liability of the shareholders; that was fixed on the failure of the bank before the transfer was made. As has already been shown, so much of the property assigned as is charged with a trust in favor of the bank can be reached in the hands of the assignees. The promise not to assign with preferences against the bank does not of itself avoid such an assignment for fraud.

It is claimed, however, that the deed is fraudulent and void on its face—1, because it appropriates partnership assets to the payment of individual debts in preference to the debt of the partnership; and, 2, because of the peculiar provision which is made for bidding by the creditors of the second class at any public sale that may be made of the assigned property.

As to the first of these objections it is sufficient to say that as early as 1837 the supreme court of appeals of Virginia decided in the case of McCullough *vs.* Somerville, 8 Leigh, 418, that a provision like that contained in this deed did not vitiate the assignment, but that a court of equity would, if required, so control the administration of the trust as to apply the partnership property to the payment of the partnership debts in preference to those of the individual partners, and the individual property to individual debts. This ruling was followed in Gordon *vs.* Cannon, 18 Gratt., 387, decided in 1868, and its authority was recognized by all the judges, though there was some difference of opinion as to its applicability to the particular facts of the latter case. We see no reason to depart from what seems now to be the recognized rule of decision in the State, and we have no hesitation in saying that if there ever can be a case when such an assignment ought to be sustained it should be in this.

The evidence discloses such a mingling of partnership and individual assets, and of partnership and individual debts, as to make it difficult in some cases to separate the one from the other. After a long and careful investigation of the whole matter a separation may now have been made which approximates correctness, but when the assignment was made it is not probable that this could easily have been done. All the property, including that of the firm and that belonging to the several partners individually, has been put into the trust, and in the administration may, if necessary, be so marshalled as to prevent the creditors of the individual partners from getting an illegal advantage over those of the partnership, and *vice versa;* at any rate we find nothing which, under the circumstances of this case, viewed in the light of the decisions of the highest court of Virginia, will render the whole assignment fraudulent and void as to the bank, and subject the property to the payment of its debt in preferences to all others, as it is claimed should be done.

It will be time enough to consider in what way the trust ought to be administered when a case is made for that purpose.

This brings us to the consideration of the bidding clause of which complaint is made, and as to this it may be said there is no provision which can in any manner result to the advantage of the assignors in opposition to the creditors, for until the creditors are all paid in full the assignors can get nothing. If payment is made it matters not to the creditors how it is done. In no event can any but the first and second class creditors be affected injuriously, and they are not here complaining. Although the bank is named as a creditor in each of the classes the object of the present suit is not to control the administration of this branch of the trust, but to set aside the assignment altogether.

The only question we have now to consider, therefore, is whether this particular provision is fatal to the whole assignment. There is nothing whatever in the instrument to show that if it had been supposed this direction to the assignees could not legally be followed, the assignment would not have been made in its present form with this provision left out. On the contrary, everything looks the other way, for the assignees are authorized to sell at either public or private sale, according to their discretion, and it is only when the sale is public that the bidding clause becomes operative. The evident purpose was to stimulate bidding, not to give one creditor an unconscionable preference over another, nor to secure any special advantage to the assignors. It is not such an essential part of the scheme of the trust as to make it vital.

At most it is a mere appendage which may be lopped off without injury to the main purpose of the instrument. Its only effect, so far as the deferred creditors are concerned, must be for their advantage, because the more the property sells for the greater will be the chances of paying those preferred in full and leaving something for those who are unpreferred.

No creditor can have an assignment for the benefit of creditors set aside at his suit, except it be on the ground that he has been defrauded. If this particular provision operates as a fraud upon those who are affected by it relief can undoubtedly be had in some appropriate proceeding for that purpose, but that is not, as has been seen, the purpose of the present suit.

Our conclusion is that the assignment is valid, but that the receiver is entitled to the surrender to him by the assignees of such of the property in their hands bought and paid for with the moneys of the bank as he elects to take.

A decree in accordance with this opinion may be prepared.

I concur.

(Signed) HUGH L. BOND,
Circuit Judge.

492 *Final Decree. June 15th*, 1886.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk, Virginia,

vs.

R. T. K. BAIN, GEORGE M. BAIN, Jr., and JAMES G. BAIN, Surviving Partners of Themselves and Thomas A. Bain, Deceased, Late Bankers and Partners, under the Firm Name and Style of Bain & Bro., and as Constituting the Late Firm of Bain & Bro.; William W. Old, John T. Griffin, and John B. Jenkins, Trustees, and Others.

This cause came on to be further & finally heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed as follows, viz:

It appearing to the court, for reasons stated in their opinion in writing, and made a part of this decree, that the deed of assignment executed April 6th, 1885, by Bain & Bro., &c., to William W. Old, John T. Griffin, and John B. Jenkins, trustees, in the bill and proceedings mentioned and referred to, was made and executed
493 by the grantors without any actual fraudulent intent on the part of the said grantors, or either of them, to hinder and delay their creditors, and that they devoted all their property, partnership and individual, of every kind, to the payment of their debts, and that nothing was kept back by them; and it further appearing to the court, for reasons also stated in their said opinion in writing, that the said deed of assignment is not fraudulent and void on its face, as claimed by the said plaintiff, but that the same is legal and valid, the court is of opinion and doth declare that the said deed of assignment of April 6th, 1885, executed by Bain & Bro., &c., to William W. Old, John T. Griffin, and John B. Jenkins, trustees, is legal, valid, and binding, and the court doth adjudge, order, and decree that the said deed of assignment be, and the same is hereby, sustained.

But it further appearing to the court, for reasons also stated in their said opinion in writing, that as to money of the Exchange National Bank used by Bain & Bro., or any of the members of said firm, in the purchase of property in the hands of the said
494 trustees, and traced into such property, there was a resulting trust and equity in favor of the said bank, of which the said trustees are to be considered as having had constructive notice, but that it has been impossible to trace the money obtained from the said bank by the said firm, or any of its members, directly into property in the hands of said trustees, except in the instances set out in the said written opinion of the court, viz:

Real Estate.

Inventory No. 22, bought May, 1876.
Inventory No. 50, bought Sept., 1881.
" " 58, " April, 1884.
" " 65, 66, and 67, bought Aug., 1881, and October, 1882.

Colorado Mines.

Interest in Boomerang, bought August 30, 1884.
" " Laura Dunmore, bought August 4, 1884.

Personalty.

Dismal Swamp Canal Company stock, bought Dec., 1880.
Seaboard & Roanoke R. R. Co. stock, 1 share, bought about 1879, or the proceeds of sale thereof.
Ocean View R. R. & Hotel Co. stock, 122 shares, bought Oct., 1880.
Chesapeake & Idaho Gold & Silver Mining Co. stock, 625 shares, bought after 1881.
Guano & guano bills from cargo of Mt. Edgecomb to the extent the same came into the hands of the trustees after deducting the offsets.

495 Norfolk & Ouray Mining Company stock, 3602 shares, personal property of James G. Bain.

And no money having been used in the purchase of the items of property hereinbefore just set out other than such as was taken directly from the bank for that purpose, and under these circumstances the said items of property standing in the place of the money used, the court is of opinion and doth declare that the said William H. Peters, receiver of the Exchange National Bank, is entitled to a surrender by the said trustees of such of the said property hereinbefore set out and found to have been actually purchased with the moneys of the said bank as he elects to take; and the court doth adjudge, order, and decree that the said trustees do surrender to the said William H. Peters, receiver, such of the said property hereinbefore set out and found to have been actually purchased with the moneys of the said bank as he elects to take; and by making said election & receiving such property the said receiver is not to be estopped from receiving the full benefit of the said deed of
496 trust, or the provisions thereof, in favor of the Exchange National Bank, & the court doth so adjudge, order, & decree.

And the court doth further adjudge, order, & decree that the said plaintiff is not estopped from claiming under the said deed of trust by reason of having instituted this suit attaching the said deed & claiming the same to be fraudulent & void. And the court doth dismiss the plaintiff's bill as to all matters not herein decreed in his favor, & as to all matters of defence contained in the cross-bill of the said trustees, defendants, the said cross-bill is dismissed, but leave is granted to the said trustees to prosecute the same as an original bill, seeking the direction of the court in the administration of the trust.

And the court doth further adjudge, order, & decree that the costs of this suit be paid out of the trust funds in the hands of the defendant trustees.

And thereupon the said plaintiff in open court prays an appeal to operate as a supersedeas from & to this decree to the Supreme Court of the United States, which appeal & supersedeas is thereupon allowed in open court. And it appearing to the court that
497 this suit & the appeal & supersedeas from & to this decree are prosecuted by the direction of the Treasury Department of the United States, no bond, obligation, or security is required from the said Wm. H. Peters, receiver, as aforesaid, acting under the direction aforesaid of the Treasury Department, as provided by section 1001 of the Revised Statutes of the United States, & this order is to operate as an appeal & supersedeas, as aforesaid, citation being waived by parties present by their counsel in open court. And the defendant trustees also pray an appeal from this decree, which is now in open court allowed, the said defendants to give bond in the penalty of $1,000.00 before said appeal shall be effectual.

June 15th, 1886.

M. R. WAITE, *Chief Justice.*
HUGH L. BOND, *Ct. Judge.*

498 Circuit Court of the United States for the Eastern District of Virginia.

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, in the fourth circuit, do hereby certify that the foregoing is a true copy of the record and proceedings in the suit in equity in the said court between William H. Peters, receiver of the Exchange National Bank of Norfolk, plaintiff, and R. T. K. Bain & *als.*, defendants, wherein an appeal and supersedeas to the Supreme Court of the United States was allowed by the Chief Justice of the United States in the final decree entered in said cause on the 15th day of June, A. D. 1886.

Given under my hand and the seal of the court this 20th day of September, A. D. 1886, and in the year of our Independence the 111th.

[Seal United States Circuit Court, Eastern District of Virginia, Norfolk.]

M. F. PLEASANTS, *Clerk.*

[Endorsed:] William H. Peters, receiver of the Exchange National Bank of Norfolk, Va., appellant, *vs.* Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, late partners under the name & style of Bain & Bro., and John T. Griffin, William W. Old, and John B. Jenkins, trustees, and others, appellees. Transcript of record.

Endorsed on cover: E. Virginia C. C. U. S. No. 1005. William H. Peters, receiver of the Exchange National Bank of Norfolk, Va., appellant, *vs.* Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, late partners under the name & style of Bain & Brother, and John T. Griffin, William W. Old, and John B. Jenkins, trustees, *et al.* Filed September 21, 1886.

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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 87.

WILLIAM H. PETERS, *Receiver of the Exchange National Bank of Norfolk, Virginia* .....*Appellant*

vs.

ROBERT T. K. BAIN, GEORGE M. BAIN, JR., and JAMES G. BAIN, *late partners under the name and style of Bain & Brother;* and JOHN T. GRIFFIN, WILLIAM W. OLD and JOHN B. JENKINS, *Trustees, et al*.....*Appellees.*

Appeal in Equity from the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF FOR THE APPELLANT.

THEODORE S. GARNETT,
ATTORNEY FOR RECEIVER.

WILLIAM J. ROBERTSON,
OF COUNSEL.

NORFOLK LANDMARK STEAM PRINT, 1889.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 87.

WM. H. PETERS, *Receiver of the Exchange National Bank of Norfolk, Virginia*, ... *Appellant*

vs.

ROBERT T. K. BAIN, GEORGE M. BAIN, JR., and JAMES G. BAIN, *late partners under the name and style of Bain and Brother;* and JOHN T. GRIFFIN, WILLIAM W. OLD and JOHN B. JENKINS, *Trustees, et al*..... *Appellees*

Appeal in Equity from the Circuit Court of the United States for the Eastern District of Virginia.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the 15th day of June, 1886, in a suit in equity brought by William H. Peters, Receiver of the Exchange National Bank of Norfolk, against the late firm of Bain & Bro., then composed of George M. Bain, Jr., (who was Cashier of the said Exchange National Bank of Norfolk) Robert T. K. Bain and James G. Bain (Directors of the said bank) as survivors of

themselves and Thomas A. Bain, deceased, and against their Trustees, W. W. Old, John T. Griffin and John B. Jenkins, under a deed of assignment from Bain & Bro., the purpose of said suit being to set aside the said deed of assignment as fraudulent in law and fact.

The material facts touching the organization of the Exchange National Bank of Norfolk and its suspension and failure on the 2nd day of April, 1885, and subsequent appointment of the Receiver, as well as the facts attending the organization and conduct of the business of Bain & Bro., a firm of bankers and brokers of Portsmouth, Virginia, who suspended and failed at the same moment with the Exchange National Bank, are sufficiently found and stated by the Court in the opinion filed by the late Chief Justice, (see Record, p. 425) who sat with the Circuit Judge in the trial of the cause.

The opinion proceeds to set forth the official relations of these several individuals to the bank as follows: George M. Bain, Jr., Cashier from July 7th, 1870; Robert T. K. Bain, a Director from January 2nd, 1872, and James G. Bain, Assistant Cashier from August 11th, 1873, to January 11th, 1881, and Vice President from that date to the closing of the bank, April 2nd, 1885. Thomas A. Bain was a Director from January 11th, 1876, until his death in 1877.

The capital stock of the Exchange National Bank was $300,000, and of this capital the firm of Bain & Bro. and the individual brothers together held more than one-third.

The Chief Justice says:

"Very soon after Bain & Bro. became connected with the "bank they began to absorb its funds. As they wanted money "they got it, with or without security as was most convenient "for them. They had no direct connection in their own "private banking business with the Bankers Clearing House "at Norfolk, but they were represented in that association by

"the Exchange National Bank, which paid all balances against "them, and these at some times amounted to very large sums. "The commercial and business paper which they took at their "banking house in Portsmouth was largely re-discounted for "them at the bank, and on the 31st of March, 1885, their in- "debtedness to the bank has been stated approximately as "follows:

"Bain & Bro.'s notes unendorsed and unsecured	$ 800,000 00
"Notes of others endorsed by them	593,251 99
"Cash tickets	211 00
"Bain & Bro.'s notes endorsed by bank and "discounted in New York	50,000 00
In all	$1,443,462 99

"In addition to this George M. Bain, Jr., and James G. "Bain each owed the bank very considerable sums. Such being "the condition of affairs, the Comptroller of the Currency re- "quired the bank to reduce at once the unsecured debt of "Bain & Bros. and to make good the deficiency in its reserve "fund. In consequence of this the firm on the 31st of March "sold to the bank the following stocks and bonds:

"Seaboard Compress Company's stocks	$300,000 00
"Meherrin Valley Railroad bonds	200,000 00
"Southern Telegraph bonds of the par value "of $140,000, at	70,000 00
"In all	$570,000 00

"and guaranteed that the same should yield the amount for "which they were taken whenever put upon the market.

"This being done, and the firm also agreeing not to assign "their other property for the benefit of creditors with preferences "against the bank, notes of the firm and other indebtedness to

"the amount agreed on as the value of the stock and bonds "were surrendered and the unsecured debt thereby nominally "reduced."

It is respectfully insisted that it sufficiently appears from the testimony of George M. Bain, Jr., (Record, pp. 200, 201, questions 207 to 219,) that this nominal reduction of the debt was made by simply restoring to the bank a part of the property which they had purchased with the funds of the bank fraudulently abstracted, and which, after the demand of the Comptroller, they were afraid longer to conceal.

The opinion goes on to state:

"What was thus done did not satisfy tho Comptroller, "and on the 2nd April, 1885, he took possession of the bank "for the purpose of winding up its affairs. The Banking "House in Portsmouth closed its doors at the same time."

"This produced great excitement both in Portsmouth "and Norfolk, and resulted in the assignment which is now "attacked."

The statement of the object of this suit as made in the opinion, to-wit: "(1). To set aside the assignment made by the partnership firm of Bain & Bro. and the several members thereof for the benefit of their creditors and to subject the assigned property to the payment of the debts of the bank," and

"(2.) To charge the property in the hands of the assignees with a trust in favor of the bank because it was bought with money of the bank which certain members of the firm who were officers of the bank had wrongfully used for that purpose,"

does not sufficiently emphasize the grounds of complaint which the Receiver has shown against the deed in question. He asks for relief against a monstrous fraud, perpetrated upon the bank and its depositors by *all* the members of the firm of

Bain & Bro., who were *all* officers and trustees of and for the bank, by an attempted conveyance of the bank's property fraudulently taken and mingled with funds which they could not distinguish from their own, to trustees of their own selection, who had legal notice of their fraud.

The fact that among the features of this fraud the plaintiff charged and proved that the assignees had taken under that conveyance a large and valuable part of the property, real and personal, belonging to the bank, which the firm of Bain & Bro. had fraudulently obtained from the bank, although constituting ground on which, even if there were none other, the suit is maintainable, is chiefly to be regarded as one of the most convincing badges of the fraud by which the whole conveyance is invalidated, and was accordingly so relied upon by the plaintiff.

It is this separation of the plaintiff's suit into two distinct demands by the Court, as if they had no connection with each other, which has caused confusion and occasioned the error of which the appellant now complains.

The Receiver, under the direction of the Secretary of the Treasury and the Comptroller of the Currency of the United States, has appealed from that decree on the ground that the Court has erred in refusing to set aside and declare absolutely void the deed of trust of Bain & Bro , dated April 6, 1885. (See Record, p. 26).

In order to a clear understanding of the systematic frauds which culminated in the deed of April 6th, 1885, it is necessary to state more fully the situation as it existed for a few days prior to the execution and recordation of that deed.

It would be difficult to conceive of clearer proof than has been furnished of collusion and conspiracy on the part of the defendants Bain & Brother, as officers of the Exchange Na-

tional Bank, to obtain without security the funds of the Bank for their own use and benefit.

This fact is found by the Special Master in his report (Record, p. 94) and is affirmed by the Chief Justice in terms of just condemnation. He says:

"The evidence shows beyond doubt that the affairs of the "bank were managed almost exclusively by the members of "firm. The funds of the bank were under their immediate "control as its officers and agents, and consequently as its "trustees. These funds were converted by them regardless of "their duty as trustees into this particular property, which "still exists in specie." (Record, p. 429.)

This was said of the property which was disclosed, by the examination of the defendants themselves, as being detected in the hands of the trustees in the deed executed by them and the conveyance whereof was attacked on the ground that such guilty intent vitiated the whole instrument, the deed being thus clearly shown to have been intended to delay, hinder and defraud the plaintiff.

And so indeed the Chief Justice ascertained and decreed, as to that portion of the estate in the trustees' hand distinctly identified as having been purchased with the money of the bank.

On pages 427-428 of the Record, he says: "Mr. Old, one "of the assignees, is an attorney-at-law, and was retained as "counsel for the firm. He advised them in all their matters "and drafted the assignment. He was informed of the agree-"ment which had been made not to assign with preferences "against the bank, and knew generally of the large indebted-"ness of the firm and its members to the bank. He also knew "of the transaction between the bank and the firm on the 31st "of March, and hearing that it was the intention of the credi-"tors of the bank to enjoin the assignment, he made haste to

"have it executed and recorded before anything of that kind "was done."

And again (see Record, p. 430,): "We think in this case "the assignees are chargeable with notice of the equities of "the bank. They may not have had actual knowledge of the "wrongful conversion of the moneys of the bank into the prop- "erty which has now been identified as such, but it is clear that "Mr. Old, who alone of the assignees was present during the "negotiations which preceded the assignment, had full notice "of the confusion which existed in the affairs of the bank, as "well as those of the firm, and of the intimate relations which "for a long time existed between the two institutions."

"The assignment was hastened to prevent further compli- "cations, and we have no hesitation in holding that the as- "signees took title subject to any equities that might be found "to exist in favor of the bank. They were put on inquiry which "they avoided to save what they could."

I. FIRST ASSIGNMENT OF ERROR.

Under these circumstances it was plainly proper to set aside the deed as fraudulent in fact and altogether void. To refuse this was error.

The appellant insists that the facts found by the Court and stated in the opinion, establish the fraud of the grantors in the d ed with notice thereof to their trustees such as to invalidate an annul *in toto* the deed of assignment of Bain & Bro.

To avoid this the defendant Trustees plead want of notice of their grantors' fraud. Their answers deny all knowledge of the facts which the Chief Justice has found that they did know, or negligently turned away from knowing. Means of knowledge with the duty of using them constitute in equity all the notice which actual knowledge could convey. Their denial of notice is not confined to any particular part of the

case, but is full and general, and upon it they base their defense, claiming to be considered as *bona fide* purchasers for value.

Upon this issue the Circuit Court has found and distinctly pronounced that they "*are chargeable with notice of the equities of the bank,*" and for that reason has decreed that they shall surrender to the Receiver, such of the property mentioned in the deed and set out in the decree, "found to have been actually purchased with the moneys of the bank, as he elects "to take." But as to all the other property mentioned in the deed and purchased with a mixed fund, the Court declared that the deed was made without any actual fraudulent intent on the part of the grantors, or either of them, to hinder and delay their creditors, and that the deed was not fraudulent on its face. This was error.

One mode of testing the correctness of this decision is to compare the provisions made in the deed as to preferences of creditors, with the facts as ascertained from the testimony and found by the Court.

Among the first preferred creditors mentioned in the deed the Exchange National Bank has been placed, and an individual debt of George M. Bain, Jr., secured to the bank, the amount whereof is $43,000.

In the second-class of preferences are placed all the creditors of Bain & Bro. who were depositors in their banking house in Portsmouth, the amount of their claims aggregating more than $800,000, and along with them are secured notes of the Greensville Land and Lumber Company to the amount of $102,000, which are held by the Exchange National Bank.

And thirdly, if the assets be sufficient to pay all the above mentioned claims in full, then the debt of Bain & Bro., which exceeds $1,000,000, is to be paid to the Exchange National Bank.

The entire estate, be it remembered, falls short of $500,000 in value, as estimated by the trustees, so that the mention of the bank in the third class of creditors is only adding insult to injury. It is simply the complete fulfillment of R. T. K. Bain's vehement assurance to his depositors that he "would suffer his right arm to be torn from his body before he "would deed away any of his property other than for the use "of the depositors in general of Bain & Bro.'s Bank, of Portsmouth." (Record, pp. 175, 176, testimony of R. T. K. Bain.)

That a court of equity could tolerate such a disposition of plunder by faithless fiduciaries to so-called Trustees who are proven to have had constructive notice of their grantors' frauds is difficult to be accounted for.

It was error, essential and fundamental, to treat this deed as one made by unfortunate men, of good character and reputation, who were overtaken by a sudden calamity in business through no fault of their own, instead of regarding it as it is, one of dishonest and dishonored men steeped in embezzlement and fraud

Their character and conduct clearly shown by the testimony in the case, viewed in connection with the finding of the Court that the Trustees "were put on inquiry which they "avoided to save what they could," should have lead the Court to the conclusion that fraud permeated and vitiated the whole instrument, and was not confined to the property into which the money of the bank was distinctly traced.

If any authority is needed for so plain a proposition it is found and clearly stated in the case of *Russell vs. Wynne*, 37 New York, 591, citing *Grover vs. Wakeman*, 11 Wend., 194. (S. C. 25 Am. Dec. 624 and 71 Am. Dec. 755, 758.)
By the Court, Grover, J. :—

"The only remaining question is whether if the mortgage "be fraudulent as to creditors, as to a part of the property "mortgaged it can be upheld as to the residue.

"To render it valid it must have been given in good faith "and for the honest purpose of securing the debt, and without "any intent to hinder or defraud creditors. This cannot be "true when the object in part, or as to part of the property is "to defraud creditors. This unlawful design vitiates the en- "tire instrument; the unlawful design of the parties cannot "be confined to one particular parcel of the property. Entire "honesty and good faith is necessary to render it valid; and "whenever it indisputably appears that one object was to de- "fraud creditors to any extent the entire instrument is, in "judgment of law, void." *Russell vs. Wynne*, 371 N. Y. 591.

In the other case above cited a similar attempt was made to distinguish between a guilty intent and a good intent in one and the same conveyance.

"This distinction cannot be supported in the present case. "The statute of frauds refers to a legal and not a moral in- "tent; that is, not a moral intent as contradistinguished from "a legal intent. It supposes that every one is capable of per- "ceiving what is wrong, and therefore, if he do what is for- "bidden, intending to do it, he will not be allowed to say that "he did not intend to do a forbidden act."

The Court found and declared the grantors and each of them to be trustees for the bank.

That they almost exclusively managed the affairs of the bank.

That the funds of the bank were converted by them regardless of their duty as Trustees.

And its first conclusion is that a trust *ex maleficio* is established with constructive notice thereof to the grantees in the deed.

The Court then holds that there was no such fraudulent intent as to a portion of the property, which it concedes was purchased with money of the bank mingled with the general funds of Bain & Bro, and says:

"The mixture of the money of the bank with the money "of the firm did not make the bank the owner of the whole."

We submit that this is not a correct statement of the question.

It is not whether the bank thereby became "the owner of "the whole," but simply what equity is established in favor of restitution to the bank of the funds which its faithless guardians had absorbed and concealed by mingling them with their general funds, no matter whether it should require the whole or only a part of those funds to remedy their wrong.

The incapacity of the grantors to convey the property amassed by them through years of systematic plunder of the bank's funds is fully demonstrated when the details of their crime are considered.

They started ont in business with a capital of $5,000. As soon as they became directors of the bank they began to "ab- "sorb its funds," increasing their greed as they saw their plunder accumulate, or as their wild speculations in real and personal estate, stocks, bonds, mines, railroads, manufactures or trade demanded. The money which they took in from the depositors at their banking house in Portsmouth was not "a "drop in the bucket" compared with what they steadily drained from the vaults of the bank. Indeed, their depositors' money was scarcely more than they used to discount the $600,-000 of paper which they rediscounted at the Exchange National Bank. Therefore it is easy to see in what direction they invested the immense sums of money which they took from the bank. Clearly it was put in o the real and personal estate now in the hands of the Trustees in the deed, the validity of which is assailed.

The disclosure as to the part of the property remaining in specie, coming within the strict rule laid down by the Circuit Court, was extorted from the witness R. T. K. Bain as a part of his confession on his examination.

The reason why no further disclosure was possible, is because of the deliberate trickery and concealment by Bain & Bro. of all their dealings and accounts with the bank. They kept no account on their books with the bank, and no property accounts whatever to identify any investment of the banks' funds which they were constantly abstracting and putting away. They were examined in vain for any explanation of their dealings in these funds. The witnesses George M. Bain, Jr., and R. T. K. Bain had ample opportunity to show how this vast indebtedness to the bank arose, and what has become of the money thus obtained, but they are dumb. No cry is heard from them of losses in business, unprofitable investments, carelessness of management, want of thrift or economy in managing their affairs, either firm or individual. No theory, absolutely none, is offered by them to account for the disappearance of the moneys taken from the bank. Under this condition of things, when by their own confession they used the money of the bank as their own "general fund" out of which they made all their purchases, the question presents itself: On whom does the burden rest of separating their own lawfully acquired money from that obtained unlawfully from their *cestui que trust?*

We insist that the moment the court below ascertained their purchases of the "property in the second-class" as it is termed, to have been made with funds of their own mingled with trust funds of the bank, it should have held that the burden of proof was upon them; and that the trust *ex maleficio* attached to the whole property until the guilty parties effected the separation of the property acquired with the money of the bank by satisfactory proof of the property, if any there was, acquired with their own money.

The proofs in this cause establish the fact that the brothers Bain used the Exchange National Bank as part and parcel of their brokers establishment, without the least attempt at

distinguishing the two concerns, their own testimony in this respect being that whenever they needed money they obtained it, not from their depositors or any other source, but "from "the Exchange National Bank."

The Court finds that this was done by them "regardless of their duty as trustees" and "with or without security, as was most convenient for them."

The well-established rule of equity in such cases is that stated by Vice-Chancellor Wood :

"If a man mixes trust funds with his own the whole will "be treated as trust property, except so far as he may be able "to distinguish what is his own."

Frith vs. Cartland, 2 Hem. & Mill, 417, 420.

Here the fiduciaries have not only confessed to having mingled the moneys of the bank with their own, but that the moneys of the bank formed their "general fund" rather than any other, and they have carefully tried to conceal their investments of such mingled funds by keeping no account whatever of their fraudulent acquisitions.

Upon this point the Court will observe that the witnesses R. T. K. Bain and George M. Bain, Jr., possess most convenient memories. When interrogated as to the stocks and bonds which they had delivered up to the bank on the 31st of March, 1885, they could easily remember that these investments were made with the funds of the bank, but where the inquiry was calculated to affect the title to properties which they had conveyed to their trustees in this deed, they had lost all recollection as to the funds with which they were purchased. No better illustration than this can be given of the wisdom of the rule which casts on them the burden of proving what part of the mingled funds was legally their own property.

The trustees under the deed have made no effort to effect the separation of trust funds from individual or firm estate. They

offer no proof on the subject, and regard the plaintiff's effort to trace the property not with indifference merely, but with absolute hostility, relying upon the utter confusion in which their grantors' books were habitually kept to perfect the title to the whole estate which their grantors sought to acquire by the misapplication of the funds of the bank.

The inherent vice of their title can never be cured; certainly not by ignoring the obligation which the law imposes upon them, namely, to show the Court how much of their grantors' property obtained with the mingled fund, was acquired with that portion of it belonging to them.

II. SECOND ASSIGNMENT OF ERROR.

The Appellant for a second assignment of error in the decree, says:

That the Court erred in failing to find that the deed of trust of Bain & Bro. was fraudulent and void for the reason that it was executed in fraud of sections 5151 and 5234 of the Revised Statutes of the United States, and with the intent to hinder, delay and defraud the bank and its Receiver from the recovery of the stock assessments due by the said Bain & Bro., and by each member of said firm.

The sections of U. S. Revised Statutes thereby intended to be violated and avoided, are as follows:

"Sec. 5151. The shareholders of every national banking "association shall be held individually responsible, equally "and ratably, and not one for another, for all contracts, debts "and engagements of such association to the extent of the "amount of their stock therein at the par value thereof, in "addition to the amount invested in such shares."

"Sec. 5234. * * * Such Receiver, under the "direction of the Comptroller * * may if necessary to pay

'the debts of such association, enforce the individual liability "to the stockholders."

At the time of the failure of the bank, to-wit: April 2n 1885, the defendants Bain & Bro. and the several members of their firm were owners and holders of the following amounts of the capital stock of the bank:

Bain & Bro	582	shares.
George M. Bain, Jr	232	"
James G. Bain	91	"
Robert T. K. Bain	91	"
Thos. A. Bain's estate	91	"
Total	1087	"

All of which was partnership property. (See deposition of R. T. K. Bain, Record, pp. 157, 158).

And George M. Bain, Jr., was the owner jointly with John B. Whitehead of 100 shares of said stock.

After the failure of a national bank, the unpaid liability of its stockholders constitutes assets for the payment of its debts.

The bank having failed, this liability of Bain & Bro. became absolute and certain. Their effort to place these assets beyond the reach of the bank and its creditors, as attempted by their deed of trust, is a fraud upon the Statute and the bank.

Their fraudulent intent is shown by the act itself. Both parties to the deed, Bain & Bro. and W. W. Old, their trustee, testify that they knew this liability had been incurred. The trustee accepts the conveyance drawn by himself, with full knowledge that it would place this fund and its security,—all the assets of Bain & Bro., and the fiduciaries of the bank,—in his hands, appropriating their whole estate to other uses, thus defeating all the debtors' ability to respond to the stock assessment, it being the deliberate purpose of the trustee, as he himself testifies, to deny and repudiate all such obligation.

It is impossible that a Federal Court of Equity can tolerate such an act.

The importance of this question, as one of first impression must be our excuse for asking the attention of the Court to its careful consideration.

This Court has distinctly defined in recent decisions the nature of the obligation resting upon the directors of corporations touching the management of capital stock.

"The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a *trust fund* of which the directors are the trustees. It is a *trust* to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a *sacred one* and cannot be disregarded. Its violation will not be undertaken by any just minded man, and will not be permitted by the courts."

Upton vs. Tribilcock 1 *Otto*, 47.

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. * * * When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied. *The creditors have a lien upon it in equity.* * * * * * * * If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. *It is publicly pledged* to those who deal with the corporation for *their security.*

"Unpaid stock is as much a part of this pledge and as "much a part of the assets of the company as the cash which "has been paid in upon it."

Sanger vs. Upton, Assignee, 1 *Otto*, 60.

These cases are cited with much force by *Hughes*, J. in

Bowden vs. Santos, 1 *Hughes*, 161, and the learned Judge, quoting the language of the Supreme Court of the United States in *Webster vs Upton, Assignee*, adds:

"The whole subscribed capital stock of a corporation is a "trust fund for the payment of creditors when the corporation "becomes insolvent. The stock cannot be released, i. e., *the "liabilities of the stockholders* cannot be discharged to the in- "jury of creditors, without payment."

He also cites *Angell and Ames on Corporations:* 10th ed s. 535-625, as follows:

"One point is very clear, and that is that no member can "exonerate himself from his liability, and defeat the claims of "creditors by transferring his stock to a bankrupt, or to any "one unable to respond to his obligations."

If these principles of equity apply to every ordinary stockholder, how much more forcibly should they control the action of stockholding directors of a national bank who are trustees of the capital stock fund for the benefit of its stockholders and creditors.

It was error in the decree and in the opinion on which it was based, to treat this deliberate attempt of the guilty directors to prevent an effective enforcement of their liability as stockholders as nothing more than the act of an individual stockholder in assigning his property in disregard of his stock liability. The opinion uses this language: "The shareholder "of an insolvent bank is no more prohibited from preferring "creditors as against his liability in that capacity than he is "against any one else that he owes." This does not touch the question of a director's duty, since the trust relation is altogether wanting in the case of an ordinary shareholder, so that there is no similarity in the two cases.

Here it was the sworn official and fiduciary duty of the Bain Brothers, as directors and cashier of the bank, to guard

the assets of the bank from all danger of loss. Their liability as stockholders unquestionably constituted an asset of the bank definitely fixed as soon as its insolvency occurred (Irons vs. Manufacturers National Bank, 21 Fed. Rep. 197), an asset which they, occupying their fiduciary positions, had no right to endanger or prevent from being realized, but, on the contrary, were bound to see to it, as far as they could, that it should be fully preserved for the benefit of the creditors of the bank. So that, if this liability stood on the footing of a mere ordinary debt they had no right to execute a conveyance of their property by which the Receiver would be rendered unable to enforce it effectively and having done so, the deed of trust would, even if free from other objection, be fraudulent and void. But it is respectfully submitted that this liability stands upon a higher footing than that of an ordinary debt; it is properly to be regarded as *stock liability, in like manner and to the same extent as if it were an unpaid subscription to the capital stock*, constituting a part of the trust fund and coming directly within the principle of the decisions above-mentioned.

Although the assignment carried with it those shares of stock of Bain & Bro.—all their "stocks" being expressly conveyed to these Trustees,—they repudiate the obligation to respond to the assessment, and thus the intention of these faithless directors in making the deed and in violating their trust, is rendered effectual to work their fraud upon the other stockholders and creditors of the bank. This asset of the bank is wiped out of existence by the act of its custodians. This trust fund should have been sacredly preserved. It is publicly pledged and set apart by law. All persons dealing with the directors are presumed to have notice, but in the case at Bar the trustee admits that he knew of the official character of his clients and of their liability to the assessment. Yet he took from Bain & Bro. an assignment conveying to himself both the "stocks" on which they were liable and all the assets of the

parties out of which such assessment should be paid, with the avowed purpose not to pay the same. Knowing that his grantors were committing this breach of trust, he is deprived of the plea that he is a *bona fide* purchaser. The law fixes upon him even if he had failed to admit it, notice of the fiduciary relations of his clients as directors of the bank, and he cannot escape the consequence of their fraud.

For this reason alone, if for none other, the Court should declare this deed fraudulent and void.

If such an act be sanctioned and upheld by Federal Courts of Equity then the security publicly pledged for creditors of National Banks is a delusion, and the trust fund which the same courts declare shall be sacredly managed a *caput mortuum*. On the faith of this security the creditors contract and the stockholders rely. At the critical moment, when it is most needed, the fiduciary, by his own act, abolished the trust fund, conveys away to the trustee of his own choice (his attorney) with notice of the grantor's fiduciary relation, both the stock and all his means to pay for it, and both parties retire behind the fiction of law that such a grantee is a *bona fide* purchaser for value.

The statutory liability cannot be evaded. The policy of the law, if nothing else, forbids it. "This conclusion neces-
"sarily results from the American doctrine that the capital
"stock of a corporation is a trust fund for the security and
"benefit of creditors. This fund, consisting not only of money
"which has been paid in on account of stock subscriptions,
"but also of money which subscribers have agreed to pay in,
"it is obvious that a court of equity will not allow that por-
"tion of it which consists of unpaid subscriptions to be frit-
"tered away by the transfer of shares with the purpose of es-
"caping the obligations arising out of the contract of subscrip-
"tions and accruing to creditors. Such an arrangement can-
"not stand, even if done with the consent of the Board of

"Directors, because the giving of such consent would involve "a breach of trust on their part."

Thompson on Liability of Stockholders, sec 215.

"It follows and has been decided in almost every variety "of situation that any arrangement or manipulation which "disperses this fund or even converts it into common assets is "void as against creditors who have given credit on the faith "of it."

Thompson on Liability of Stockholders, sec. 237.

Sawyer vs. Hoag, 18 Wall. 710.

Adler vs. Milwaukee Pat. Brick Co., 13 Wis., 60.

Hightower vs. Thornton, 8 Ga., 495.

Allen vs. Montgomery R. R. Co., 11 Allen, 467.

Ward vs. Griswoldville Man. Co., 16 Conn., 599.

See also:

Nevitt vs. Bank of Port Gibson, 6 *Smedes & Marshall*, 513, in which Chancellor *Kent* filed an opinion.

Wood vs. Dummer, 3 *Mason*, 309.

"The circumstance that the corporation was at the time "of the transfer notoriously insolvent would be sufficient to "warrant the inference of fraudulent intent."

Thompson on Liability of Stockholders, sec. 215.

It is no reply to this position to say that the Courts of Virginia tolerate preferences, and that there was no lien on Bain & Bro.'s estate for their stock liability.

Creditors have a lien in equity upon the unpaid assessments due to the capital stock fund by a mere stockholder. How great then is the duty of directors of National Banks to see that this trust fund shall not by any act of theirs suffer impairment.

Nor is it any answer to the charge that this deed was made in fraud of the National Banking Act to say that the grantors had the right to prefer their ordinary creditors above their *cestui que trust* creditor, the bank.

Such preferences cannot be allowed to stand when it would work a breach of trust and consumate a fraud upon the creditors and stockholders of the bank.

Their first obligation in equity and good conscience was to guard sacredly the trust fund for the creditors of the bank, not to fritter it away by stripping themselves of all means to meet their obligation. The deed perpetrates a fraud and the grantees, taking it with full knowledge of their breach of trust, cannot claim any title under it as against the Receiver's right to enforce the performance of that trust by removing every obstacle to the payment of their stock assessment in full.

All the analogies between this case and those above cited are perfect. On the solution of this question depend not only the rights of the creditors of the Exchange National Bank, but also the vast interests of the National Bank system throughout the Union.

Let the directors of National Banks know that they may exempt their property from their statutory liability as stockholders after insolvency which their own frauds have produced, by a simple transfer of all their estates to trustees with preferences under the laws of each State, and the whole theory and policy of the Act of Congress is instantly subverted. It places the National Bank Act, so far as it aims at security for the people, within the power of dishonest directors under the ever-changing assignment laws of the several States.

On the other hand, the enforcement of the policy of the Banking Act, for which we contend will sweep away fraudulent devices to escape that liability,—will arrest breaches of trust committed by the Directors of banks to the injury of creditors,—will eatablish confidence in the securities publicly pledged for their protection in dealing with the banks, will attain the object for which this provision of the law was intended, and will operate effectively to the suppression of fraud and the advancement of justice.

The question arises under a law of the United States. It is not to be governed by any statute or any decision of any State. It is a purely Federal question, and must be settled by the doctrine prevailing in Federal Courts of Equity untrammeled by any technical rule of State Courts touching trustees for the benefit of preferred creditors or making them bona fide purchasers for value.

It is submitted that if the Circuit Court did not err in refusing to consider this as ground for the avoidance of the deed, certainly it erred in failing to enforce in favor of the Receiver to the full extent payment of the stock liability of the Directors out of the fund which they had fraudulently transferred to trustees who aided them in their attempt to render nugatory the assessments.

III. THIRD ASSIGNMENT OF ERROR.

The Circuit Court has erred in holding that the Receiver "is entitled to a surrender by the assignees of such of the "property which it is found had actually been purchased with "the moneys of the banks as he elects to take, *but of no other.*"

As to the property which it was found had actually been purchased with the moneys of the bank the Court entertained no doubt of the existence of a trust *ex maleficio*, and decreed that constructive notice of this trust is fixed upon the trustees, thus denying their plea of *bona fide* purchase without notice.

But, said the Court, there is a "second class of property," the payments for which were made out of funds of the bank mingled with the estate of Bain & Bro., and as to this class "the mixture of the money of the bank with the money of the "firm did not make the bank the owner of the whole," and "purchases made and paid for out of the general mass cannot "be claimed by the bank unless it is shown that its own "moneys then in the fund were appropriated for that pur-"pose." (Record, p. 429). We submit that this is error.

1. In the first place, repeating the caution which we ask the Court to observe,—that the fraudulent intent of the grantors in conveying away the property which they had bought with the funds unlawfully abstracted from the bank, as ascertained by the Court, with notice thereof to their trustees, is sufficient of itself to taint the entire transaction, and should have constrained the Court to vacate and annul the deed as a whole, we proceed to show how the error of the Court results in manifest wrong and injustice to the plaintiff by depriving him of even the benefit which the Court admits he should receive.

The specific property which the Court in its opinion (Record, p. 428) and in the decree (Record, p. 433) finds was bought by the defendants with moneys abstracted from the bank, which though mingled with their own funds, yet have been traced into this property, aggregates in value the sum of $149,372.21.

This is the amount which the Court declares is traced as having been unlawfully "converted by them regardless of "their duty as trustees" into this particular property which still exists in specie. And yet it proceeds to decree, not restitution *in integrum*, but only of such as the Receiver elects to take and none other; in the face of the fact that $90,000 of this embezzled money went into Norfolk and Luray Mining Stock, which, pending this suit, has become worthless.

The defendant trustees point to the traced property and show with satisfaction that "the amount of $148,372.21 should "be reduced to $20,077.18," because of certain failures of Bain & Bro. to realize from their speculations in stocks.

Such a "resulting trust" is a mockery. Is it possible that the "trust resulting to the bank by reason of the wrong-"ful and unlawful use of its funds by its officers in the pur-"chase of property for the firm," (Record, p. 429) should turn to ashes the moment its existence is declared?

Such is not the modern doctrine of equity.

Mr. Justice Bradley, in the recent case of Frelinghuysen vs. Nugent, 36 Fed., Rep. 229, says: "Formerly the equitable "right of following misapplied money or other property into "the hands of the parties receiving it depended upon the "ability of identifying it, the equity attaching only to the "very property misapplied. This right was first extended to "the proceeds of the property, namely, to that which was pro- "cured in place of it by exchange, purchase or sale. But if it "became confused with other property of the same kind, so as "not to be distinguishable, without any fault on the part of "the possessor, the equity was lost. Finally, however, it has "been held as the better doctrine that confusion does not "destroy the equity entirely, but converts it into a charge "upon the entire mass, giving to the party injured by the un- "lawful diversion a priority of right over the other creditors "of the possessor."

That what Mr. Justice Bradley says "has been held *as the better doctrine*," is now the prevailing rule both in England and America, is abundantly shown by all of the recent cases. The leading English cases on the subject are, *Pennell vs Deffell*, 4 D. G. M. & G. 372; *Frith ve. Cartland*, 2d Hem. & M. 417; and *Knatchbull vs. Hallett. In Re Hallett's Estate*, 13 Ch., D. 696.

In the case of *McLeod vs. Evans*, 28 Northwestern Reporter, 173 (to be found also in 66 Wiscon. Rep., 401), It was held, that,

"A banker who accepts for collection a draft, and in fact "collects the money thereon, holds the same as trustee of the "owner; and after his assignment for the benefit of his credi- "tors the trust character still adheres to the fund in the hands "of the assignee, irrespective of other creditors, even though it "cannot be traced into any specific property."

Cole, C. J., discusses the question so thoroughly, and refers

so fully to the authorities, that we hope to be pardoned for giving a long extract from his opinion—embracing many of the authorities to which he refers—to which we invite the attention of this Court as showing the number of Courts in this country, acting independently of each other, by which the rule has been recognized and enforced.

He says:

"But it is said none of the proceeds of this draft are in "the hands of the Assignee, nor is there any security bought "or obtained by the bank in his possession. Still, these facts are "indisputable. The Chicago Bank to which Hodges sent the "$1,500 draft gave him credit for the amount on its books. "Hodges drew against that credit in the regular course of his "business as a banker, and his drafts were honored by the "drawee. Presumably Hodges obtained money for his drafts "which he used in the transaction of his business, or applied "to the payment of his debts. So these funds which he ob-"tained by his own drafts against the $1,500, credit were sub-"stituted for the proceeds of the $1,500 draft and went into "his estate.

"The conclusion is irresistible from the facts that the pro-"ceeds of the trust property found its way into Hodges' hands "and were used by him either to pay off his debts or to increase "his assets. In either case it would go to the benefit of his estate. "It is not to be supposed that the trust fund was dissipated "and lost altogether, and did not fall into the mass of the as-"signor's property; and the rule in equity is well-established "that so long as the trust property can be traced and followed "into other property into which it has been converted, that "remains subject to the trust. The authorities cited by the "plaintiff's counsel fully sustain this proposition. We do not "understand that it is necessary to trace the trust fund into "some specific property in order to enforce the trust. If it "can be traced into the estate of the defaulting agent or trus-

" tee this is sufficient. The decisions in Firth vs. Cartland, 2 " Hem. & M., 417; Pennell vs. Deffell, 4 De. G., M. & G., 372; " Knatchbull vs. Hallett, 13 Chy Div., 696; National Bank vs. " Insurance Co., 104 U. S. 54; Van Alen vs. American Nat. " Bank, 52 N. Y., 1; People vs. City Bank of Rochester, 96 " N. Y., 52; Farmers & M. Nat. Bank vs. King, 57 Pa. St., " 202; Peak vs. Ellicott, 30 Kansas, 156; S. C. 1 Pac. Rep., " 499, in principle sustain this conclusion. The cases in " 96 N. Y. and 30 Kans and 1 Pac. Rep. are directly in point."

Two of the Judges in McLeod vs. Evans dissented, but that dissent was based upon no diversity of opinion as to the rule of equity above announced, for they say (28 N. W. Rep., p. 214) " that they fully endorse what is termed 'the progres- " 'sive' or 'modern' rule of equity as stated by Jessel, the " late learned Master of the Rolls *in re* Hallett's Estate, 13 Ch. " Div. 696." And after stating the facts of that case (Knatchbull vs. Hallett), proceed to say of it:

" It was simply held that the *cestui que trust* could take " the proceeds of the sale if they could be identified, and if not " identified, but traceable into other property or mixed fund, " then she could have a charge or equitable lien upon such " other property or fund for the payment of the amount which " her money had increased the fund. Such seems to be the " well established rule."

See also: *Arnold vs. Robbins*, 5 Atlantic Reporter, 173, (N. J.) and *Metzner vs. Bauer*, 98 indiana, 428.

The rule thus laid down has in the case of *National Bank vs. Insurance Company*, 104 U. S., 54, been recognized and applied by this Court.

In the case at the bar the confusion and mingling of assets was not " without fault on the part of the possessors " but was accomplished by a course of systematic thievery on the part of dishonest fiduciaries. So that the equity of the bank

would not be lost, even if the rule which Mr. Justice Bradley refers to as having prevailed before the "better doctrine" was established were still in force.

The Court below has entirely ignored the right of the plaintiff to a charge upon the entire mass of the estate, with priority over the other creditors of Bain & Bro., by erroneously reducing his recovery to the paltry value of the traced property, rendered worthless by the bad speculations of Bain & Bro.

It is said in the decree (Record, p. 433) that "it has been "impossible to trace the money obtained from the said bank "by the said firm or any of its members directly into the prop- "erty in the hands of the said trustees, except in the instances "set out in the said written opinion of the Court." (Record, p. 433.)

The main question at issue in this cause is the validity or invalidity of the deed of trust.

As bearing upon the *bona fides* of that instrument the appellant has shown and the Court below has found that the funds of the bank fraudulently misappropriated by the directors as its trustees were used beyond all doubt in the purchase of certain property specified in the decree, and has declared the plaintiff entitled to have it surrendered to him by the assignees of Bain & Bro.

But the appellant contends that the Court, having in its opinion found that the other moneys of the bank not specifically identified have been traced into the estate of Bain & Bro. and mingled with their own funds, has erred in not compelling the defendants, the wrong-doers, and their trustees, to separate their own from the money of the bank.

To illustrate the reasonableness of this established rule of equity and at the same time show that, as a matter of fact, the Court has overlooked the evidence touching the conversion by Bain & Bro. of a large sum of money belonging to the bank, we would cite one conspicuous instance of their fraud.

It is that which relates to the moneys obtained by Bain & Bro. on the re-discount of notes of Wallace & Son amounting to $105,000 of the bank's funds, every dollar of which was due from Bain & Bro. to the bank at the time of the execution of the deed of trust. Is not this money distinctly traced into the property conveyed by Wallace & Son to Bain & Bro?—a conveyance made at the same time with the deed of trust from Bain & Bro. to their trustees, the identical property being taken in order to embrace it in that trust, and which the plaintiff charges in his bill was "part and parcel of the "scheme of fraud and conspiracy." (Record, p.p. 6 and 19).

This sum of $105,000 was taken from the bank in the form of re-discounts of notes of Wallace & Son, the notes constituting part of the iddebtedness of Wallace & Son to Bain & Bro., in consideration of which the conveyance from Wallace & Son to Bain & Bro. was made. (Record, p. 19).

And so being a part of that consideration will not a Court of Equity treat the property so conveyed as the property of the bank to the extent of the bank's money thus invested in it by Bain & Bro?

And if this be so, was it not a fraud for Bain & Bro. to convey this property by their deed of trust to secure debts due to others than the bank, the trustees (as is shown by the extract from the opinion already given) being chargeable with such notice, that they "took title subject to any equities that "might be found to exist in favor of the bank?"

We submit that this palpable fraud vitiates and renders void the whole transaction.

But if we are in error in this, then clearly there is established here an equity in favor of the bank, arising from the fact that the property of Wallace & Son was purchased with the re-discounted notes and conveyed by the trust deed, the bank being left to hold the shadow of Wallace & Son's

worthless paper. It being proved that the consideration named in the Wallace deed,$151,000,embraced the $105,000 of the bank's money,

Mr. Old testifies that "it was understood by the trustees" * * * * * * * * * that their (Wallace & Son's) "indebtedness" was to be wiped out by these deeds." Record, p. 203.

All of the Trustees admit this, and yet the three Bain Brothers unite in an affidavit (Record, p. 51) swearing that they sent for Mr. Old "to prepare an assignment and such "other papers as would enable them to make available for "their creditors as a part of their estate the large debt due "them from Wallace & Son."

In taking the conveyance of the property of Wallace & Son in payment of the indebtedness thus due on the re-discounted notes, Bain & Bro., even if they had not previously occupied a fiduciary position, made themselves in equity Trustees for the bank to the extent of the property thereby acquired. And in transferring the property thus acquired to Old and others, trustees, to be applied to the payment of debts due to others than the bank, they committed a fraud upon the bank; and the assignment should be set aside as fraudulent and void, for this cause, if for no other; or, failing in this, the Court should have decreed a charge of $105,000 in favor of the Receiver upon the Wallace property conveyed by Bain & Bro. to their trustees.

IV. FOURTH ASSIGNMENT OF ERROR.

It was error in the Circuit Court to hold that the deed of assignment of April 6th, 1885, "was made and executed without any actual fraudulent intent on the part of the said grantors, or either of them, to hinder and delay their creditors."

The opinion (Record, p. 430), after finding that under the Statute of Virginia authorizing a creditor to set aside a con-

veyance by his debtor on the ground of fraud without having first obtained a judgment, the suit was properly brought, says: "We find no evidence whatever of any actual fraudulent intent "on the part of the firm or either of the partners to hinder "and delay their creditors,—meaning, of course, the bank rep- "resented by the plaintiff in this suit."

An examination of the proofs in the record will, we think, satisfy this Court that such intent did exist.

The Virginia statute above referred to is found in the Code of Virginia, edition of 1873, chapter 175, section 2, and reads as follows:

"A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

The Virginia statute touching fraudulent conveyances is found in the Code of Virginia, 1873, chapter 114, section 1, as follows:

"Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

The defendants Bain & Bro. make oath (Record, p. 51) that "it is impossible for them to designate with what money "the property conveyed by said deed of assignment was "bought," but that "it was usually paid for out of the general "fund in their banking business."

The testimony shows that this "general fund" consisted chiefly of money abstracted from the bank; that they mingled these funds with their own, buying the property which has been traced, as well as that which is mixed with but not distinguished from their own "out of the general mass of moneys in their possession," made up in far the larger part of "what had been wrongfully taken from the bank."

The two concerns—the bank and the brokers establishment—were in effect one and the same, so far as the Bains were concerned, being controlled by the Bains as Cashier and Directors for the use of their own firm, without attempting to keep the accounts so as to show the true character of the transactions, but on the contrary concealing their investments of the bank's funds.

These facts being proved by uncontroverted testimony and by the finding of the Special Master in the cause, it is difficult to understand how it was possible for the Court to escape the conclusion that there was not only fraud in applying the moneys of the bank to the purchase of the property into which they were distinctly traced, but also a fraudulent intent to hinder and delay the bank as their creditor.

Having for a long series of years dealt in gross frauds against the bank, their last act of treachery and the one by which all previous frauds were consummated—the conveyance of the property acquired with their ill-gotten "general fund"—could not be made without an "actual fraudulent intent." To hold that there was no such intent is to infer innocence from direct and uncontradicted proof of guilt.

They had violated every duty they owed to the bank, and by a long continued and ever increasing process of abstraction taken to themselves the greater part of its assets, and finally undertook to convey away for the benefit of others the property thus acquired.

Their course of dealing proves the intent. If for years they persisted in "absorbing" the funds of the bank, without security, for their own use and benefit, it is clear that they have forged a chain of fraud whereof the deed of trust is only the last link.

The Virginia decisions permitting a debtor in failing circumstances to prefer one creditor to another, have no application to a case like this. The Bains were in possession of no property which they could lawfully convey to any one to the prejudice of the bank.

The plaintiff has made good the charge of misconduct and fraud.

This was done under circumstances most adverse and against the most strenuous efforts on the part of the grantors and their trustees to obstruct the investigation.

Application for leave to examine the books of Bain & Bro. was so opposed as to require a special order of the Court, necessitating a lengthy examination before a Special Master to bring to light the course of dealing of Bain & Bro. with the moneys of the bank.

The report of the Special Master is a clear and positive arraignment of their fraud. (Record, pp. 75 to 94.)

1st. He states the official and fiduciary relations of Bain & Bro. to the bank and full notice thereof to the assignees.

2nd. He shows that the property is so indefinitely described in the deed as to afford no information to the creditors of its nature or value. Taking the inventory filed by the trustees, and their estimates of its value, the Special Master finds

the entire assets of Bain & Bro. at the date of their failure to be about $419,369.90.

The contrast between assets and liabilities is so marked as to challenge belief.

The debts secured in the deed being about...	$ 950,000 00
Unsecured due to the bank.....	1,296,768 31
Total liabilities	$2,246,766 31

Nearly two and a quarter millions of dollars.

"The debt due the Exchange National Bank by Bain & Bro., about $1,000,000 cannot in any event be reached at all if the deed be allowed to stand as valid." (Record, p. 94).

What have Bain & Bro. done with the moneys so wrongfully and fraudulently taken from the bank? With their own depositors' money they discounted nearly $600,000 of customers' notes, largely bad, and rediscounted the same notes at the Exchange National Bank! The moneys of the bank, they confess, formed their "general fund," and with this they made and concealed their investment. Allowing the largest estimate of valuation on what they have attempted to convey to trustees, there remains totally unaccounted for more than $1,000,000.

In fact, of all the assets of the bank, in paper (notes, bills, call loans, &c.), amounting at the date of its suspension to an aggregate of $2,433,172.46, the firm of Bain & Bro. had obtained money thereon from the bank directly or indirectly in the sum of $1,271,721.45, thus showing that more than one-half of all the debts due to the bank had been contracted by Bain & Bro., or in their interest or that of some one of the firm or family.

All purchases of property, the payments for which were made with the moneys of the bank coming to them through the clearing house, while Bain & Bro. were continually in-

debted on clearing house settlements, were necessarily made with the funds of the bank.

All purchases made with the moneys represented by the due-bills in the Receiving Teller's cash, and carried there (as in the case of the Guano Ex Mount Edgecombe, $59,725.97) until relieved by proceeds of new discounts of their own paper still unpaid, were necessarily made with the funds of the bank.

All purchases made by either member of the firm by checks on the bank, having at the time no money there to meet them, were without doubt made with the money of the bank without authority or security, and in violation of their official duty, as in the case of George M. Bain's purchase of the "Laura Dunmore" and "Boomerang Mines" with $16,333.33 of the bank's fund.

These are actual frauds of which the trustees are found to have had "constructive notice."

"When conveyances are attacked for fraud and there are "many facts surrounding the case which cast suspicion on the "transaction, the defendants should be prepared to meet the "allegations of unfairness, and if they fail to do so, the plain-"tiff will be entitled to the benefit of all the unfavorable infer-"ences that may be legitimately drawn from their neglect and "the general features of the case."

Bishop on Insolvent Debtors, sec. 20, p. 227.
Newman vs. Cordell, 43 Barb., 448.

In this case, the trustees instead of attempting to refute the allegations of unfairness, or to repel the inferences legitimately to be drawn therefrom, endeavor to defend themselves on the ground that notwithstanding the fraud of their immediate grantors, they are *bona fide* purchasers for value, without notice of any fraudulent intent, or of the fraud rendering void the title of their grantors to the property conveyed by the deed.

If they had knowledge of facts sufficient to excite the sus-

picions of a prudent man and put him upon inquiry, they made themselves parties to the fraud—*Bartles vs. Gibson*, 17 Federal Reporter, 297, and cases there cited. It will not do for a party to shut his eyes, or his ears, and say he did not see or hear. As was said by Mr. Justice Strong, in *Cordova vs. Hood*, 17 Wallace, 8, "Means of knowledge, with the duty of "using them are, in equity 'equivalent to knowledge itself.'"

In the case at Bar the assignors must be deemed to have intended the natural and inevitable consequences of their acts, and that was to hinder, delay and defraud their creditors.

Their precedent violations of their fiduciary duty were preliminaries to the deed of April 6th, 1885, which was but the consummation of long-continued acts of fraud.

The trustees in that deed do not deny that they had knowledge of the trust relations of the Bains to the bank, and of their duty towards it to respond to their stock liability.

They had, therefore, actual knowledge of the grantors' intent to avoid that liability, if none other.

Did they possess means of knowledge of their other frauds and intent, past and present?

Did the chosen counsel of the firm of Bain & Bro. to whom they made the conveyance, neglect to inquire?

Was it his duty to inquire?

The evidence shows how complete was his information on every subject. He describes the difficulties and complications surrounding his clients, and how he viewed the crisis in all its aspects.

He well knew the official relations of Bain & Bro. towards the bank, and knew also that they owed the bank, on their own notes, $325,000, and on the notes of others endorsed by them, $550,000, and that as stockholders they were liable to a still further and greater extent.

He was thus brought face to face with the fact, that these

officers and stockholders had incurred an immense liability to their own trust, contracted in violation of the Natianal Banking Act, and their responsibility as such fiduciaries was a circumstance, which in any honest settlement of their affairs, could not be disregarded.

But to fasten this duty upon him still more strongly, the situation itself demanded his attention. At the very beginning he was surrounded, he says, by "rumors floating in the air of one kind and other which only caused the excitement to increase as the hours sped on." (W. W. Old's deposition, Q. 3, p. 289.)

And when pressed to define those rumors and that excitement, he does so as follows:

"Q. 61. How were Bain & Bro. and their relation to the "Exchange National Bank concerned in these rumors?

"A. Because Bain & Bro. or the members of that firm were "directors or officers of the bank and the firm was indebted to the bank.

* * * * * * * *

Q. 67 (p. 319). Did you neither see in the daily newspapers "of that period nor hear from other sources reports of mis-"management and illegal use of the funds of the Exchange "National Bank by its cashier and its directors, Bain & Bro.?

"A. I think I read such charges as the newspapers had.

"Q. 68. And do you here say that you did not attempt to "ascertain the truth or falsity of such charges?

"A. From whom, the newspapers?

"Q. 69. From either the parties themselves, Messrs. Bain & "Bro. or from any other available source?

"A. So far as Messrs. Bain & Bro. are concerned and so far "as such information as I had from them on the subject was "concerned, they always stoutly denied that the rumors in the "newspapers did them justice.

"Q. 70. Did you seek information from the agents of the "Comptroller in charge of the bank?

"A. I did not.

"Q. 71. Or did you take any other evidence as to those "charges than the denials of Bain & Bro.?

"A. I did not ask them for the purpose of getting informa- "tion about charges such as were made in the newspapers, as "having any effect or bearing, directly or indirectly, upon "their rights to dispose of their property. Such information "as I got from them I got incidentally, and never felt called "on to make any inquiry about it either one way or the other, "as affecting their right to make their assignment."—W. W. Old's deposition, Q. 67, &c., p. 319.

In other words, he simply shut his eyes and ears to any information on that subject, and declined to make any inquiry.

Could there be a more perfect delineation of conduct which justifies the imputation of constructive notice, equivalent in equity to actual notice?

During the preparation of the deed, however, a rumor reached him to which he gave full faith and credit:

"I kept posted as far as I could in regard to the action of the depositors of the Exchange National Bank, and was advised on Monday evening of their attempt to get an injunction to prevent the recordation of that deed." (Q. 66, and answer, page 319 of W. W. Old's deposition).

This was the only rumor which he deemed worthy of his attention.

But ample means were close at hand to ascertain the truth or falsity of those charges which Bain & Bro. denied. When they assumed the more serious shape of legal proceedings to obtain an injunction, was it not the part of a prudent man to investigate the cause? The agents of the Comptroller were at the bank; their official report and the instructions of the Comptroller to the Directors of the bank in their hands would have convinced any ordinary mind of the fraud of Bain & Bro.

It was his duty, as the chosen trustee, to use his eyes and his ears,—not to close them or remain indifferent to the situation.

Instead of this he declares that when he heard of such an attempt he did all in his power to prevent it. Why this anxiety to prevent the proposed judical inquiry if there was no reason to suppose that it would result in showing that the Bains had no right to make a deed such as the one he was engaged in preparing?

Was it not his duty to inquire, at least, whether there was any legal or equitable obstacle to the execution and recordation of the deed?

Could he assume, in this condition of affairs, to decide at once and without investigation, that neither the depositors of the bank nor the Comptroller of the Currency had valid ground of objection to the conveyance he was engaged in preparing, and that no reason existed why he should stay his hand, even for one night, in his haste to execute and record it?

The evidence of this haste is clear, and the steps taken to avoid the anticipated injunction, and prevent legal inquiry into the right to make the deed, show conclusively that a plain duty was neglected—that of making inquiry which would have led directly to knowledge of the grantors' fraud.

The conclusion is inevitable—the Trustees are neither *bona fide* purchasers for value, nor purchasers *without notice.*

2. There were moreover facts known to the Trustee, showing that Bain and Brother had no right to make the deed.

On the 31st of March, 1885, Bain & Bro., through R. T. K. Bain, effected an absolute sale to the bank through its attorney, Mr. A. P. Thom, of certain stocks and bonds for $570,000 of their notes, due bills, &c. This was accomplished by giving at the same time a verbal promise not to make an assignment giving preferences against the bank.

On the 3rd day of April, 1885, notice of this promise was given to Mr. Old, counsel for Bain & Bro., by Mr. Thom, as counsel for the bank, then retained by the agents of the Comptroller.

This fact is established by the testimony of both parties.

The counsel for Bain & Bro. conferred with his client, R. T. K. Bain, ascertained that he had made the promise, and states that he "unhesitatingly told Mr. Bain that there was no legal enforceable obligation resting upon him or his brothers by reason of that promise"—that it was a moral obligation—and says, that among the reasons given him by R. T. K. Bain for violating it, was this remarkable one; to-wit: "that it was made at a time and under circumstances which had altered and for a purpose which had not been accomplished." (W. W. Old's deposition, cross-questions 50 to 58, p. 316, 317).

Another reason:

"He (R. T. K. Bain) hesitated to call upon them to keep a promise which he had made and which he knew if he insisted upon keeping it, that his brothers would feel it equally binding upon them to keep." (Answer to cross-question 55).

The trustee took no steps to inquire what those brothers desired in the matter; nor did R. T. K. Bain.

Had the trustee inquired he would have learned, as Mr. Thom did from George M. Bain, Jr., "that he thought it impossible that his brother could be considering the violation of the pledge," and "that it seemed impossible to convince him that any such thing was in contemplation as a breach of the pledge." See A. P. Thom's deposition, pages 252, 253.

That promise was made upon sufficient consideration.

The consideration for it was the acceptance of the conveyance of the stocks and bonds to the bank on the 31st March, 1885, Bain being distinctly informed that it would not be accepted without such promise. (See the deposition of A. P. Thom, Record, p. 250).

The withdrawal from the bank of Bain & Bro.'s notes and due-bills ($570,000) was "coupled with a promise that no preference would be given to their prejudice."

Hughes, J. in the case of *Shufeldt vs. Jenkins* et als., 8 Va. Law Journal, 721, cites this identical circumstance as part of "a fraud too palpable to need characterization."

In that case, Judge Hughes says:

"That E. C. Jenkins on a promise not to give preferences "had induced complainants to withdraw from bank a note "falling due. and had nevertheless, after obtaining the with- "drawal of the note by such promise, made a deed of prefer- "ence."

The case at bar is stronger than this:

If the testimony of R. T. K. Bain and George M. Bain, Jr., be true, that all these stocks and bonds were "actually or potentially" pledged and in the hands of the bank "as collaterals for the indebtedness of Bain & Bro. to said bank," then they were committing a fraud upon the bank in putting them off at the prices fixed on them, and a fraud upon the Comptroller in obedience to whose demand they thus pretended to give additional security. (Record, p. 58.)

They took care, however, not to inform the counsel for the bank that they considered those stocks and bonds as already pledged as "collateral for their indebtedness," and by that concealment, if they are to be believed, effected the withdrawal of their notes from bank. (See R. T. K. Bain's deposition, questions 248 to 555, and George M. Bain's deposition, questions 68 to 81).

But it is said that this was only "a moral obligation."

Courts of Equity will not permit the violation of a moral obligation.

"A moral obligation is a sufficient consideration for an "express promise where at some time or other a good or val-

"uable consideration has existed."—I Addison on Contracts, sec. 13, and note—with cases there cited.

The duty of Bain & Bro. to keep this promise was of the highest character. Their relations to the bank imposed it. Its violation was a fraud. The counsel and Trustee who with knowledge of its existence, took the deed to himself, must suffer the consequences, even though he may have failed to comprehend the real nature of the transaction.

But when R. T. K. Bain informed his counsel of his reasons for violating his promise, he also informed him of the considerations moving him to exclude the bank from the benefits of the deed of trust then being prepared.

These considerations arose from the facts, as stated in the answers of both the Trustees and Bain & Bro., that they regarded the bank as having received enough of their assets, meaning the stocks and bonds "passed to" the bank on the 31st March, 1885, and the "bulk of their bills receivable."

The bank had given Bain & Bro. not only full but excessive value for the stocks and bonds, and had long previously discounted the "bills receivable" which Bain & Bro. had kindly "passed to" the bank.

The Court will bear in mind that these same "stocks" and "bonds" were *purchased with moneys of the bank*, and if they had not returned them they would have been recovered in this suit.

These are the equities which the assignees seek to establish between the simple contract creditors of Bain & Bro. and the plaintiff who represents their defrauded *cestui que trust!*

The knowledge of the facts and circumstances brought home to the Trustees—first, of the fiduciary character of their grantors,—then of their stock liability; then of their immense unsecured liabilities of all sorts to the bank, and of the promise not to give any preferences against the bank and the efforts made to prevent its violation; of the rumors afloat; of the purpose to apply for an injunction to prevent the execution of the

deed,—all and each demanded careful scrutiny and inquiry, without which the trustees can have no claim to the favor of a Court of Equity as *bona fide* purchasers without notice.

V. FIFTH ASSIGNMENT OF ERROR.

The Court erred in holding "that the said deed of assignment is not fraudulent and void on its face."

Record, p. 433

The Deed is fraudulent in law,—

(*a*) because it contains the "bidding clause."

(*b*) because it appropriates partnership assets to pay individual debts in preference to the debts of the partnership.

"Fraud may be proved by the deed itself, or by evidence "*aliunde.* When proved by the deed itself it is called con- "structive or legal fraud, and cannot be disproved by evidence "*aliunde.*"—Gordon vs. Cannon, 18 Grattan, 395. Wait on Fraudulent Conveyances, sec. 9.

(*a.*) The plaintiff in his bill, paragraph viii, charges that the deed is on its face fraudulent, null and void, and should be so declared and decreed for the following, among other reasons:

The said deed provides that the Trustees "may make sale "of the real and other personal estate hereby conveyed, at pub- "lic auction or private sale, at such time or times and place or "places, and after such notice as to them shall seem best, and "they may make such sale upon such terms and conditions as "to them shall seem best, except that at any sale of said prop- "erty, real or personal, at public auction, any creditor secured "by this deed in the second-class above enumerated, shall have "the right to purchase any part or parcel of said property so "sold and pay the said Trustees therefor at its full face value "the amount found due such purchaser secured by this deed, "or so much thereof as may be necessary to enable him to com- "plete the payment of his purchase money. and to enable as

"many creditors as possible to become bidders on these terms, "the said trustees may have the real estate hereby conveyed, or "any part thereof, laid off into lots or parcels, as they may "think best."

See the Deed—"Exhibit A," with the Bill.

This remarkable and unusual provision the Trustees in their answer say "was embodied therein after grave and mature consideration, and because it was deemed absolutely essential to prevent a sacrifice of the large amount of real estate conveyed by said deed," &c.

It is true that so far as the debtor is concerned a provision of this character may be said to prevent a sacrifice of the property in this:—that it may yield a larger amount by the prices given for it by those creditors who are able and willing to take it at excessive prices in satisfaction of their debts rather than run the risk of getting nothing. But the debtor is the only party to be benefited by such a provision. As to those of his creditors who may be unable or unwilling to take his property at excessive prices in satisfaction of their demands, the property may, under it, be absolutely sacrificed; for if, as may be the case, the whole of it should be bought in by other creditors, there will be nothing left with which to pay them. And this is the result which the Receiver is seeking to avoid as one of the second-class of creditors.

The plaintiff insists that the manifest intent of this provision is to delay, hinder and defraud the bank.

The creditors in the second-class aggregate, say, $1,000,000. The inventory mentioned in the deed filed by the trustees, shows that the whole trust subject is less than $500,000.

This provision in the deed renders it invalid because

1st. No certain interest is vested in any creditor under the deed.

2nd. It permits the Trustees to depart from the order

prescribed for the payment of debts and suffer the second-class creditors to appropriate the whole estate.

3rd. It empowers the Trustees in their discretion to grant future preferences and is in effect a power conferred on them to compound and compromise with creditors, by offering an inducement to abandon their claims in the hope of saving some part. It seeks the advantage of the debtors, and reserves, directly and indirectly a benefit to themselves under the cover of the trust at the expense of the creditors.

4th. It allows the Trustees to sell the estate and receive in payment some other medium than "money." It is thus entirely inconsistent with that other provision of the deed which requires them "to convert the real and other property into cash as soon as possible."

Among the early cases involving the construction of provisions similar to this one, is the case of Grover vs. Wakeman, 11 Wend. 187, 25 Am., Dec. 624, and this will be discussed below.

1. But first.

"In its results, so far is it from devoting the assigned property to the payment of the creditors, and creating in their favor direct and absolute equitable interests, that no certain interests vest in any creditor but everything as it regards priority of payment is referred to the discretion of the Trustee."

"Such a conveyance is in open hostility with the statute of frauds. Its direct and necessary tendency is to hinder and delay creditors of their just and lawful actions, and is therefore fraudulent and void—the intention being apparent in the deed itself." Gazzam vs. Pointz, 37 Am., Dec. 748.

Chancellor Walworth in Boardman vs. Holliday, 10 Paige, 223, says :

"One very serious objection to such an assignment is that

none of the creditors among whom such preferences are to be given can ever know what their rights are under the assignment, where the fund is not sufficient to pay all the debts, so as to render it safe for them to attempt to assert these rights in any suit or proceeding."

No evidence *aliunde* can cure the vice apparent on the face of the deed.

"The assignment must itself fix and determine the rights of creditors in the assigned property and not reserve to the assignors, or to the assignee the power of subsequently doing so." Kercheis vs. Schloss, 49 Howard's Pr. 284. Riggs vs. Murray, 2 Johns., Ch. 565.

2. The order prescribed for the payment of creditors may be changed by the Trustees in their discretion. They are authorized to sell all the property conveyed at auction. It is in their power to permit the second-class creditors to bid in the entire assets and pay themselves first, thus defeating the first-class of their apparent preference.

In this regard the plaintiff as receiver was particularly injured. His position in the first-class is thus threatened, and in the second-class it is purely nominal. His duty as Receiver prevented him from purchasing at such sales. He was not authorized by law to bid with the second-class creditors, and being in the first-class, he was excluded by the deed from that favor of the grantors.

He was therefore hindered, delayed and defrauded.

3. The power granted to the Trustees under this clause is equivalent to authority to compound with the creditors and to effect future preferences just in proportion to the amount of estate they choose to sell at auction.

Boardman vs. Holliday, 10 Paige, 223.
Barnum vs. Hempstead, 7 Idem., 568.
Averell vs. Loucks, 6 Barber, 470.
Sheldon vs. Dodge, 4 Denio, 217.
Strong vs. Skinner, 4 Barber, 546.
Kercheis vs. Sloss, 49 How. Pr., 284.
Grover vs. Wakeman, 11 Wendel., 187.

In *Grover vs. Wakeman*, the Court says:

"In this case, the real object of the provision in the assignment is not so much to afford a preference to particular creditors as to secure a release from them. And to this end it seems admirably adapted. It is contrived so as to create a scramble among the creditors, and a scramble under such circumstances that its natural result will be an unjust advantage to the debtors." * * * * * And why is all this perplexity and embarrassment to be suffered? Not for the purpose of effecting a just distribution of the estate, but for that of securing by its skillful distribution an important advantage to the debtors. * * * * * In both cases the debtors seek to continue their control over the property after it is assigned, for the purpose of so wielding it as to cause creditors, or some of them, to pay a consideration for that which in justice and good conscience belongs to them."

In *Gasherie vs. Apple*, 14 Abb. Pr., 64:

"The law allows a debtor to assign his property to pay his debt and even to make preferences, but compels him to make his selections without any conditions for personal gains to himself, thus he cannot by an assignment hold out a hope of an extra share of his assets, or a fear of loss of any participation therein, as a means to induce a creditor to abandon all or any part of his claim, or to forbear pursuing his legal remedies therefor."

See also—

Hyslop vs. Clarke, 14 Johns., 458.
Searing vs. Brinkerhoff, 5 Johns. Ch., 329.
Austin vs. Bell, 20 Johns., 442.

"One device after another to cover up property for the benefit of the assignor or to secure to him directly or indirectly, some unconscientious advantage, has from time to time been brought before our courts, and received condemnation."

"Let the embarrassed debtor, therefore, assign his prop-

erty for the benefit of whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservations and conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as a consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditor; and above all, let it not put up his favor and bounty at auction under the cover of a trust, to be bestowed upon the highest bidder."

Grover vs. Wakeman, 25 Am. Dec., 624. (11 Wend., 187.)

4. The Trustees are authorized under the bidding clause to accept from second-class creditors not money, but an entirely different medium of exchange.

The deed is inconsistent. It requires the Trustees "to convert the real and other personal property into cash as soon as possible."

Cash is defined as "money,"—ready money, as distinguished from securities and property convertible into money,—"that which circulates as money."

In *Brigham vs. Tillinghast* (15 Barb., 618), where the assignee was directed to convert all and singular the premises and estate aforesaid into money or available means, the Court, at general term, were of opinion that the words "available "means," signifies means suitable for the purpose described, to-wit: the payment of debts, and therefore were unobjectionable.

But on appeal to the Court of Appeals (13 N. Y., 215), the judgment of the Supreme Court was reversed on the ground that the clause referred to necessarily conferred a power upon the assignee to convert the assigned property into securities which were not money.

This provision is a new and unusual device to obtain indirectly what the grantors dare not openly express on the face of

the deed. The tendency is fraudulent and pernicious in this, that it contemplates the formation of "rings" or "syndicates" among the second-class creditors for the purchase of all the estate, with the certainty of advantage on the part of larger over the smaller creditors. It thus permits the debtors, through their Trustees to work off their property among the second-class creditors on terms of unconscionable advantage to the debtors. It renders the deed void.

In reply to the suggestion in the opinion of the Court that all objection to this provision is removed by the power given to the Trustees to sell at public or at private sale, and that it is only when the sale is a public one that the provision becomes operative, it is to be said that the grantor in the deed had no greater right to confer upon the Trustees the power to carry the provision into effect at their option, than they themselves had to direct it absolutely. See Gazzam vs. Pointz, 37 Am., Dec 747, (4 Alabama 374).

The only relief that can be effectual against a provision of this character is to set the deed aside.

The creditor complaining here is a creditor in both the first and second-class. And the Court was mistaken in saying (opinion p. 431 of Record) that "they are not here complaining."

(*b.*) The deed is fraudulent and void upon its face because it appropriates partnership assets to the payment of individual debts in preference to the debts of the partnership.

This principle, after many conflicting decisions, may now be regarded as firmly established, as a rule of general law—falling within the class of cases in which Federal Courts do not feel bound to follow State decisions. See Olcott vs. Supervisors, 16, Wallace 689, and Burgess vs. Seligman, 107, U. S. 20.

An authoritative announcement may be found in the case

of Woolridge vs. Irving, 23d Fed. Rep, page 678, and note at the end of case:

Hill, J., "Had it provided that the firm assets should be applied to the payment of individual debts, without first satisfying the debts owing by the firm, I would hold the assignment fraudulent and void."

Note.—"An attempt to assign partnership property for the purpose of paying the private debts of one of the partners, when the firm is involvent, is conclusive of an actual fraudulent design."

See cases in note 10, p. 484, and in note 1, p. 485, 23rd Fed. Reporter.

It is evident from the face of the deed that these forbidden appropriations of partnership and individual assets are indiscriminately made.

The fraudulent intent is nowhere rebutted by the defendants, and notice of it to the Trustees is established by the deed itself.

Hughes J., in *Johnson vs. Strauss*, 4th Hughes, 628, quotes as follows:

"If A and B are partners and are pecuniarily embarrassed, and convey goods which they hold in common in payment of a debt due by B individually, the transfer is voluntary and constructively fraudulent on the part of A."

See also *Gable vs. Williams*, 59 Maryland, reports, p. 46. In that case the Court says:

"There is no room left for doubt as to the construction of the terms of this deed. It entirely ignores, and if effect were given to it, it would entirely destroy the privileges and preferences to which the partnership creditors are entitled, of having the debts due them paid out of the assets of the firm in course of liquidation, to the exclusion of the separate creditors of the surviving member of the firm."

See *Story on Partnership*, section 367 and note 2.

The State Courts have held conflicting views as to the fraudulent character of such disposition. In the Virginia cases of McCullough vs. Somerville, 8, Leigh 415, and Gordon vs. Cannon, 18 Grattan, 387, the Court, while recognizing the impropriety of such disposition and the rights of partnership creditors as above defined, yet undertook to construe or reform the deed in those special cases "according to the probable intent of the parties."

This result was reached after much apparent hesitation, and presumably because the deeds in those cases were otherwise free from taint. No consideration of reason or policy can be urged upon a Federal Court to adopt this unusual and extraordinary equitable remedy, especially in a case like this.

It will be noted that nearly the whole of the real estate conveyed in this deed is proved to be partnership assets, bought with the "general funds" of the firm, for partnership purposes; and is therefore to be treated in equity as personalty.

A. & W. Sprague Man'f'g Co. vs. Hoyt, 29 Fed. Reporter, 421.

Shanks vs. Klein, 104 U. S., 19.

Allen vs. Withrow, 110 U. S., 119.

In conclusion, the appellant prays this honorable Court, in behalf of the creditors of the Exchange National Bank for relief against this gross fraud.

If conduct such as is shown by the record to have actuated the grantors in this deed, while they were officers and directors of the bank and trustees for its creditors can be sustained, then the losses to which they have subjected those creditors, though more than a million in amount, sink into insignificance beside the consequences to the public that would follow.

It is most respectfully submitted that for the manifest errors in the decree whereof the appellant complains, the same should be reversed and relief granted him according to the prayer of his bill.

The Cross-Appeal.

It is proper here to notice the contention which the Trustees of Bain & Bro. have raised by filing their cross-bill in this cause, and which was dismissed by the Court below as to all the matters of defense contained therein. See decree, record, page 434. from which decree the said trustees have taken a cross-appeal.

Their first assignment of error is not well taken.

The Court decreed that the Receiver was entitled to the surrender by the Trustees of such of the property of the bank traced into their hands as he should elect to take, and that upon making such election he would not be estopped from receiving the full benefit of the provision made in the deed for the debts secured to the bank.

There is no error in this of which the cross-appellants can complain.

In Virginia, the question is settled by the Supreme Court of Appeals in the case of *Clark vs. Ward*, 12 Gratt., 440. "A creditor secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed to the payment of his debt in preference to the other creditors secured by the deed; but he fails. This does not preclude him from his right to claim under the deed his ratable proportion of the trust fund."

The trustees of Bain & Bro. by taking this position, persist in their effort to ignore the equities of the bank, and to appropriate the property proved to belong to the bank, to the uses prescribed by their fraudulent grantors.

Even were the law otherwise, it is in no sense a taking under and against the deed for the Receiver to reclaim the traced property.

The decree of the Court places this traced property out-

side of the deed, and its attempted conveyance was a fraud upon the bank which we think we have demonstrated was sufficient to avoid the whole instrument. That decree establishes the fact that the traced property is the property of the bank and could not pass under the deed made by Bain & Bro.

Their second assignment of error is fully answered in the main argument above set out under our third assignment of error.

Their third assignment of error is also fully argued above.

The fact of constructive notice to the Trustees is so distinctly found by the Chief Justice in his opinion, and so fully sustained by the evidence, as to leave no room for doubt.

Their fourth assignment of error is not well taken.

The Court below has decreed that the costs of the suit be paid out of the trust funds in the hands of the defendant Trustees.

The plaintiff having prevailed as to an important part of his demand, there could be no ground for denying him his costs out of the fund.

WILLIAM J. ROBERTSON,
THEODORE S. GARNETT,

Counsel for *William H. Peters*, Receiver of the Exchange National Bank of Norfolk, *Appellant*.

NORFOLK, VA., *October 23d*, 1889.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

No. 87.

WM. H. PETERS, *Receiver of the Exchange National Bank of Norfolk, Va.*
vs.
BAIN & BRO.; JOHN T. GRIFFIN, WM. W. OLD AND JOHN B. JENKINS, *Trustees, &c.*

APPEAL.

No. 198.

JOHN T. GRIFFIN, WM. W. OLD AND JOHN B. JENKINS, *Trustees.*
vs.
WM. H. PETERS, *Receiver of the Exchange National Bank of Norfolk, Va.*

CROSS-APPEAL.

Brief of Counsel for John T. Griffin, Wm. W. Old, and John B. Jenkins, Trustees, in the above appeal and cross appeal.

RICHARD WALKE,
LEGH R. PAGE,
JAMES ALFRED JONES, } *Counsel.*

John B. Jenkins, Trustees, was neither fraudulent in fact, nor fraudulent in law. The question of fraud in fact involved the consideration by the Court of the facts of the case; fraud in law involved the examination of the law of Virginia, as applicable to this deed upon its face, and the determination of what that law is.

The Court says in its decree: "It appearing to the Court "for reasons stated in their opinion in writing and made a part "of this decree, that the deed of assignment executed April "6th, 1885, by Bain & Bro., &c., to Wm. W. Old, John T. Grif- "fin, and John B. Jenkins, Trustees, in the bill and proceed- "ings mentioned and referred to, was made and executed by "the grantors, without any actual fraudulent intent on the part "of tne said grantors,or either of them,to hinder and delay their "creditors, and that they devoted all their property, partner- "ship and individual, of every kind, to the payment of their "debts, and that nothing was kept back by them; and it fur- "ther appearing to the Court for reasons also stated in their "said opinion in writing, that the said deed of assignment is "not fraudulent and void on its face, as claimed by the said "plaintiff, but that the same is legal and valid, the Court is of "opinion and doth declare, that the said deed of assignment of "April 6th, 1885, executed by Bain & Bro., &c., to Wm. W. Old, "John T. Griffin and John B. Jenkins, Trustees, is legal, valid "and binding, and the Court doth adjudge, order and decree "that the said deed of assignment be and the same is hereby "sustained."

But the pretension is here again set up, that this deed is fraudulent, both in fact, and in law; and these, therefore, are the two divisions, into which the argument of the case naturally falls, in the discussion of the appeal taken by the Plaintiff, Receiver.

Is the Deed Fraudulent in Fact?

In discussing this question, it is proper to ascertain first the relations of Trustees in a deed of assignment under the law of Virginia.

Relation of Trustees that of Purchasers for Value.

In Virginia Trustees in a deed of trust to secure debts or in a deed of general assignment for the benefit of creditors, are purchasers for value, and must be affected with notice. They do not occupy the position of the grantor towards the subject matter.

Such has been the uniform and repeated construction of the Virginia Statute of fraudulent conveyances by the highest judicial tribunal of that State.

The Virginia Statute is as follows: "Every gift con-
"veyance assignment or transfer of or charge upon any estate,
"real or personal, every suit commenced, or decree judgment
"or execution suffered or obtained, and every bond or other
"writting given, with intent to delay, hinder or defraud
"credtors, purchasers or other persons, of or from what they
"are or may be lawfully entitled to, shall as to such creditors,
"purchasers or other persons, their representatives or assigns,
"be void. This section shall not affect the title of a purchaser
"for valuable consideration, unless it appear that he had notice
"of the fraudulent intent of his immediate grantor, or of the
"fraud rendering void the title of such grantor." Va. Code of 1873, chap. 114, sec. 1, page 896.

Let Us Examine the Authorities.

13 Gratt., Wickham & Goshorn vs. Lewis, Martin & Co.,

427, 430–1, 432–3, 436–7. This was a deed of general assignment to Trustees for the benefit of creditors, the deed being set out on page 428. The syllabus of the case and the opinions of the Judges expressly state that the Trustee and beneficiaries in such a deed are to be regarded as purchasers for value; and Judge Daniel, on page 437, says:

"I think it has been the constant course of the Courts in "this State to regard the creditors in a deed of trust, made by "their debtor bona fide for their indemnity, in the light of "purchasers for value."

15 Gratt., Evans vs. Greenhow, 153—6, 7. The following language is used by Judge Moncure in delivering the opinion of the Court:

"A pre-existing debt is of itself a valuable consideration "for a deed of trust executed for its security; which deed, if "it be duly recorded, and was not executed with a fraudulent "intent, known to the Trustee or the beneficiaries therein, "will be valid against all prior secret liens and equities and "all subsequent alienations and incumbrances. It is not ne-"cessary to the validity of the deed that it should be executed "by the Trustee or the beneficiaries, or even that they should "know of its existence before the intervention of subsequent "claims. The deed being apparently for the benefit of the "creditors thereby secured, their acceptance of it will be pre-"sumed until the contrary appears. If any of them refuse it, "their refusal will relate back to the date of the deed, and "avoid it *ab initio* as to them. A debtor, even though he be "in failing circumstances, may lawfully prefer one creditor to "another, and make a valid deed of trust for that purpose. "These prniciples are now well settled in this State, as the "following cases sufficiently show: Garland vs. Rives, 4 "Rand., 282; Skipwith's ex'r. vs. Cunningham, 8 Leigh, 271; "McCullough vs. Summerville, 8 Leigh, 415; Lewis vs. Ca-

"perton's ex'r., 8 Gratt., 148; Phippen vs. Durham, 8 Gratt. "457; Dance vs. Seaman, 11 Gratt., 778; and Wickham, &c., "vs. Lewis, Martin & Co., 13 Gratt., 427. In the last case "Judge Daniel said (and in this part of his opinion all the "other Judges substantially concurred), 'I think it has been "the constant course of the Courts in this State to regard the "creditors in a deed of trust, made by their debtor bona fide "for their indemnity in the light of purchasers for value.'"

19 Gratt., Exchange Bank of Virginia vs. Knox. 739, 747. This was likewise a deed of general assignment for the benefit of creditors. On page 747 the Court says:

"It is equally well settled that the trustees and bene- "ficiaries in a deed of trust to secure bona fide debts are pur- "chasers for valuable consideration. A pre-existing debt is "of itself a valuable consideration for a deed of trust executed "for its security (citing and quoting from the above authori- "ties.")

So Likewise.

26 Gratt., Sipe vs. Earman, 563, 570.

28 Gratt., Shurtz vs. Johnson, 657, 666–7.

75 Va. Rep., Williams vs. Lord & Robinson, 390, 404.

76 Va. Rep., Gordon vs. Rixey, 694, 698.

Virginia Law Jour., Vol. 13, 1889, Paul vs Baugh, p. 297.

Such then is the law of Virginia, as decided by its highest Court. And it arises and is based upon the construction of a Virginia Statute. And it constitutes a rule of property in that State long established, and of daily application and effect.

This Court will, therefore, be governed by that law in construing the deed in question, and in passing upon its operation and effect.

2 Black, Sumner vs. Hicks, 532.

Idem, Leffingwell vs. Warren, 603.

6 Pet., Green vs. Neal's lessee, 291-2-7-8-9, 300-1.
5 Wall, Nichols vs. Levy, 433.
91 U. S. R., Lloyd vs. Fulton, 485.
12 Wheat., Jackson vs. Chew, 153.
24 How., Suydam vs. Williamson, 427.
18 How., Beauregard vs. New Orleans, 497, 502.
100 U. S. R., Fairfield vs. County of Gallatin, 47, 54-5.
107 U. S. R., Burgess vs. Seligman, 20, 33-4.
95 U. S., N. O. C. & B. Co. vs. Montgomery, 16.
98 U. S., Kesner & Trigg, 50-2-3.

In the last case, special reference is made to the law of Virginia on the subject: "No notice of any infirmity in the title "of Kesner to the premises is brought home, either to the "trustees or the cestui que trust, and it is denied by the latter. "Like a mortgagee, they are regarded as purchasers; and in "this case they must be considered as such, *bona fide*, and "without notice of the adverse rights of the appellant, if any "she have. Wickham & Goshorn vs. Lewis, Martin & Co., 13 "Gratt. (Va.), 427; Evans, trustee, vs. Greenhow, &c., 15 Id., "156. This part of the case may therefore be laid out of "view." Such was the language of Swayne, Justice, speaking for the Court in the Virginia case of Kesner vs. Trigg; and not only the cases referred to by him, but the additional cases cited by us and coming down to the present time leave no doubt as to the doctrine.

Discussion of Facts Relied on by the Appellant.

But what is the fraud? That must first be pointed out, whatever the relations of the trustees. What is the thing done, to make this deed fraudulent?

There are charges enough of fraud and conspiracy. They are without end. The idea of conspiracy is especially prominent. But as was said of a bill not long ago in this Court: "It is full of the words fraudulent and corrupt, and general "charges of conspiracy and violation of trust obligations. "Mere words in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of "equity jurisdiction, unless the transactions, to which they "refer, are such as in their essential nature constitute a fraud "or a breach of trust, for which a Court of Chancery can give "relief." (Van Weel vs. Winston.) And in another case: "The words 'fraud' and 'conspiracy' alone, no matter how "often repeated in a pleading, cannot make a case for the interference of a Court of Equity. Until connected with some specific acts, for which one person is in law responsible to another, they have no more effect than other words of unpleasant "signification. While in this case the offensive words are used "often enough, the facts to which they are applied, are not "such as to make the defendants answerable to the complainant for the damages and other relief he asks." (Ambler vs. Choteau.)

So here; in reading the bill to find out what is the fraud relied on, it is impossible to discover any act alleged, which makes out the fraud. And "conspiracy" is brought into requisition, obviously for the purpose of establishing some verbal connection at least between alleged frauds long prior to the deed, in taking the money of the bank, and the deed. The deed is said to be the last link in the chain of the conspiracy, the culmination of the conspiracy. But the deed was a paper divesting the grantors and their wives of everything they had. In the language of the lower Court: "They devoted all their "property, partnership and individual, of every kind, to the

"payment of their debts. Nothing whatever was kept back. "It is true some creditors were preferred over others, but this "is allowable in Virginia. From the case of Skipwith's Ex'r "vs. Cunningham, 8 Leigh, 271, decided in 1837, until now, "such has been the recognized law of the State, and this was "conceded in the argument."

A conspiracy culminating in an act, by which the parties deprive themselves of every thing they have, for the exclusive benefit of their creditors, and do what they have the legal right to do, is of little weight in annulling such act.

The Court says in its opinion: "We find no evidence "whatever of any actual fraudulent intent on the part of the "firm or either of the parties, to hinder and delay their credi- "tors." And as there was no such intent connected with the deed, the only course left was to rely upon long antecedent acts. Accordingly the claim is asserted, that the grantors being largely indebted to the bank for money fraudulently obtained could not legally make a deed of preference discriminating against the bank, by reason of being officers and stockholders of the bank.

As this idea occupied a prominent place in the argument of counsel, we feel in some sort bound to refer to it. But there are some propositions, which do not warrant counsel in discussing them. We shall do little more than state what this proposition is.

It is that the deed, to use the language of counsel, is "in "fraud of Sections 5151 and 5234 of the Revised Statutes of "the United States"; and that on the insolvency of a National Bank, there is a lien on the property of a stockholder to make good his liability for the additional assessment upon his stock in the bank. The Sections of the Revised Statutes referred to

are those imposing the additional liability on the stock, and appointing a receiver, and among his other duties directing him to enforce the individual liability of the stockholders. It is claimed that this liability of the stockholder is not merely a personal liability, but takes precedence of all other personal liabilities, and constitutes, as before stated, a lien upon his property preventing him from disposing of it.

If all this be so, undoubtedly a legal wrong has been done, as this deed, although it secures bona fide debts, and among them two large debts to the bank itself, one of about $43,000 and the other of $102,000, does not secure to the bank the liability of the grantors on their stock assessment, except in the last class. But if it did, it would not even then meet the case, as this stock liability is claimed to be a lien *ahead* of all other liabilities. But this proposition is so wholly free from any known principle of law that we will leave it here.

The Circuit Court disposes of this question in the following language:

"It is a matter of no importance in this connection that "the debt of the bank was created by fraud, or that the as- "signors were shareholders in the bank and liable as such to "assessments by the Comptroller of the Currency to meet its "debts. Fraud in the creation of an unpreferred debt is not "ground for setting aside an assignment for the benefit of "creditors which is otherwise valid, and the shareholder of an "insolvent bank is no more prohibited from preferring "creditors as against his liability in that capacity than he is "against any one else that he owes. The assignment does not "in any respect change the liability of the shareholder; that "was fixed on the failure of the bank before the transfer was "made."

To proceed, what now are the special facts relied on in the bill as constituting fraud in fact in this deed? The in-

debtedness of the grantors to the bank is set out in great detail, occupying much space. It is admitted in the answers. But notwithstanding this, the greater part of the depositions is taken up in proving it, and it is again and again referred to. Unfortunately there was an immense mass of indebtedness due and owing by Bain & Bro. They owed to their own depositors nearly a million dollars; and in their judgment they deemed it proper to apply their property to securing them as well as their other creditors, and among those other creditors the bank itself to the extent of the two large claims before referred to. They had two days before their failure, and about one week before their assignment turned over and assigned to the bank a large amount of their stocks and bonds. In making the deed they thought they were doing what was equitable and right. They desired to equalize. At any rate they applied their property to the payment of their bona fide debts. And this balancing and estimating by counsel, of which creditor got most or fared best, is foreign to any legal estimate of the case.

Again, the relations which the grantors in the deed occupied to the bank are set ont in great detail in the bill. It is admitted in the answers. Yet it is proved by the testimony over and over again, and the record and minute books of the bank are cited and introduced to establish it. It will be pardoned to counsel to refer to these matters. They are the plaintiff's case. And it is difficult to discuss them more briefly.

At the time of this writing, September 23d, 1889, no assignment of errors has been filed by the appellant.

To make this deed fraudulent in fact, there must be some actual fraud connected with the deed. It is idle to refer to the relations of these grantors to the bank, or their indebted-

ness to it, or their liability on their stock assessments.

But what other facts are referred to in the bill? Allusion is made to the two deeds from Wallace & Son, one to Bain & Bro., executed April 6th, 1885, and the other to the Richmond Cedar Works, executed April 3d, 1885; which deeds are said to be a part of this same scheme of fraud and conspiracy against the bank.

In regard to the deed to the Richmond Cedar Works, which was prior in time, the following are the facts:

The Richmond Cedar Works was a creditor of Bain & Bro., being a depositor, and having to their credit $31,885.71. The Exchange National Bank was a large creditor and the principal creditor of the Richmond Cedar Works, holding $140,000 of its notes, upon which Wallace & Son were indorsers. The Exchange National Bank also held Bain & Bro.'s interest in the Richmond Cedar Works under the assignment from Bain & Bro. to the bank of March 31st, 1885. Clearly then what benefited the Richmond Cedar Works, benefited the Exchange National Bank. Under these circumstances, Wallace & Son, who were large debtors of Bain & Bro., owing them over $300,000, conveyed by their deed to the Richmond Cedar Works certain property of theirs, which had been used in connection with the works as a timber supply, and which was necessary for their successful operation, for $55,000, receiving in payment the Richmond Cedar Works' check on Bain & Bro. for $31,885.71 (for which Wallace & Son were to get credit with Bain & Bro. by having it applied on account of their indebtedness), and the notes of the Richmond Cedar Works for the balance, secured by a reserved vendor's lien on the property. It was agreed beforehand that the deposit of the Richmond Cedar Works with Bain & Bro. should be utilized in this

way; and it was done for the purpose of benefiting not only the Richmond Cedar Works, but the Exchange National Bank, their principal creditor, and part owner. It was expressly represented, that if the Works could so utilize their deposit, they would be able to go on with their business and pay their entire indebtedness to the bank. Such was the transaction. The check of the Richmond Cedar Works on Bain & Bro. was endorsed by Wallace & Son, and with the notes was turned over by Wallace & Son to Bain & Bro.; and thereupon Wallace & Son's indebtedness to Bain & Bro. received a credit of $55,000.

But strange to say, this transaction which enured to the benefit of the Exchange National Bank, and was so intended, the object of which was to put on its feet a large debtor of the bank and enable it to pay its debt, is characterized as a fraud and conspiracy against the bank. No money whatever came into Bain & Bro.'s hands; and the notes of the Richmond Cedar Works, secured by vendor's lien, were a part of the property conveyed by the deed of assignment of Bain & Bro., and which came into the possession of the trustees.

The only possible theory of the meaning of these charges of fraud and conspiracy, is, that they proceed upon the assumption that the Exchange National Bank was legally entitled to all the assets of Bain & Bro. as well as of the debtors of Bain & Bro.; and that Bain & Bro. did not have the same legal rights as other insolvent debtors, and had no right whatever to direct or control the disposition of their property. The seizure upon facts such as these to show fraud, can only be understood from such a standpoint. The facts themselves admit of no misconception, and there is no dispute about them. They are plainly set out both in the pleadings and in the testimony. See answer of the Trustees, bottom of page 42 and page 43 (top

paging), and testimony of W. W. Old, pages 287-8, 290, 306-7-8, 330-1, being in answer to questions 3 and 4, and to cross-questions 8, 9, 12, 109.

In regard to the deed of Wallace & Son to Bain & Bro., made on the same day as the deed of assignment by Bain & Bro. (which latter deed embraced the property conveyed by the former), it is necessary only to say that Wallace & Son were large debtors of Bain & Bro., owing them over $300,000, before the credit of the $55,000 before alluded to. This is undisputed The pleadings, the books of Bain & Bro., and the testimony, all show it; and it is reported as a fact in the report of the Special Master in the cause. The value of the property conveyed by Wallace & Son, and the consideration of their deed, being *far less* than their indebtedness to Bain & Bro., there could be no legal objection whatever to their conveyance. They were also debtors of the Exchange National Bank, though to a very much less amount; but they had the right to prefer Bain & Bro So much in regard to this deed.

But there is one other fact mentioned in the bill as part of this scheme of fraud and conspiracy, still more remarkable as a ground of attack upon the deed, than the preceding.

It is in reference to the assignment of the stocks and bonds made by Bain & Bro. to the bank on the 31st March, 1885. It is found on pages 8 and 9 of the printed record. It appears that on the 10th of March, 1885, the period of the corporate existence of the bank being about to expire, and the bank having applied to the Comptroller for its renewal, an examination of the bank was made; and upon that examination the large indebtedness of Bain & Bro. appeared, and the general condition of the bank; and thirty days were granted to the bank by

the Comptroller within which to increase its solvent assets and bring its reserve fund to the amount required by law.

"Accordingly," to use the language of the bill, "the said "bank and its officers made efforts to comply with this re- "quirement, and to that end the said Bain & Bro. were re- "quired to reduce their said liabilities to the said bank and "to deposit securities with said bank for the same. In "obedience to which demand the said Bain & Bro. on the 31st "March, 1885, executed and delivered to the said bank the "following paper writing, in the words and figures following." Then follows the assignment, which it is unnecessary to set out here. By it, it appears that the bank purchased the stocks and bonds therein mentioned (which were of the face value of $640,000) at $570,000, Bain & Bro. guaranteeing any deficiency which might result upon the sale of said stocks and bonds. They also assigned to the bank their interest in the Richmond Cedar Works and in certain Southern Telegraph Company bonds as a further security for the guarantee.

It is evident from the statement of the bill itself, and from the face of the transaction, what the object and intent of it was, and what the cause which prompted it. The bank to enable it to renew its charter had, for one thing, to get rid of this indebtedness of Bain & Bro.; and it did so, and took in its place these stocks and bonds, and a guarantee of any deficiency. It is plain that Bain & Bro. were entitled to have their notes or other evidences of indebtedness representing the $570,000 delivered up to them. The transaction was entirely changed; they had assigned their stocks and bonds to the bank, and they only remained liable and could only be held liable for the deficiency which might result upon their sale; which liability was evidenced by the paper of assignment or purchase. In fact the very object of the bank was to substitute something else for these Bain notes; and this it accom-

plished, receiving stocks and securities, and without releasing Bain & Bro. from any deficiency. And still we are told in the bill, page 9 of printed record, that the delivery up of these notes and evidences of indebtedness to Bain & Bro., upon the execution of this assignment of March 31st, 1885, was wrongful and fraudulent, and was wrongfully and fraudulently permitted by George M. Bain, Jr., the Cashier of the bank; and this is a part of the fraud and conspiracy relied on to vitiate the Bain deed of assignment of April 6th, 1885. It is difficult to perceive the bearing of all this. The fact is, the bank was just so much the better off from the transaction, whether its charter was renewed or not, better off to the extent at least of several hundred thousand dollars.

But if the transaction needed any further explanation beyond that which is palpable upon its face, it has it in the testimony of Mr. A. P. Thom, who was the counsel for the bank at the time, and who was a witness called by the plaintiff. Mr. Thom testifies that he "Considered the transaction of the "acquisition of the securities eminently desirable for the bank"; and again, that "Deeming this settlement, or this arrangement, "very desirable for the interests of the bank," he advised it; and again that "The indebtedness of Bain & Bro. was retained practi- "cally, that is, so much of it as exceeded the value of the property "taken"; and when asked, if it was not "The intent of the "agreement of March 31st, 1885, that the evidences of the in- "debtedness of $570,000 should be delivered to Bain & Bro. "upon the execution and delivery of that agreement," he replied, "Certainly, it is proper for me to say that in surrender- "ing this amount of unsecured paper the bank acted by my "advice"; and again, "There was no impropriety in the act of "Mr. George M. Bain in allowing the withdrawal of that "paper, but it was done upon my express advice."

But as in itself a reply to this singular charge of fraud and conspiracy, we call attention to the following "*Note by "Counsel for Plaintiff*," made a part of the record by him, in connection with Mr. Thom's deposition, inserted by him in the deposition, and found on page 248 of the record. The following is the "*Note*": "Having been informed that the "statement in the plaintiff's bill, touching the agreement of "March 31st, 1885, might be construed by the witness, who "was then counsel for the said bank, as in some degree im- "peaching the propriety of his advice to his clients in making "that settlement, counsel for the plaintiff desires to state that "such was by no m ans the intention of the bill, on the con- "trary, in the condition of the affairs of the bank at that date "his advice to the said bank was wise and proper,and did secure "to the bank whatever can be realized from the sale of the se- "curities delivered under that agreement of March 31st, 1885."

It is useless to follow counsel in his statements as to what will be realized from the securities turned over. It is wholly immaterial. It is not without significance, however, as showing the reckless charges and allegations made in this case, to point out that the plaintiff, Mr. Wm. H. Peters, Receiver, by an exhibit brought out on his cross-examination (see pages 285 and 385–6 of the record), furnishes over his signature a description of the property of the Seaboard Cotton Compress Company, item by item, and states, as was true, that the "cor- "poration is perfectly solvent"; and that "its books, which "are open for examination, show earnings of handsome divi- "dends on its capital stock of $500,000;" and that it offers a fine opportunity for the investment of capital. It will be remembered that the stock of this Company turned over by Bain & Bro. to the bank constituted $300,000 of the $570,000. And in regard to the Meherrin Valley Railroad bonds, the title to which counsel sought in the testimony to impugn, Mr.

Peters, the Receiver, testifies: "I have no reason to doubt that "I have a perfect right to sell the road and all its bonds." And Mr. M. T. Dill, another of the plaintiff's witnesses, and the former President of that road, has to admit that he valued the road at $150,000 on a statement of assets handed by him to Mr. Bain. The bonds of the road, $200,000, turned over by Bain & Bro., was the whole issue made by the Company. But it is useless to pursue this inquiry further; the paper itself contemplated that there might be a deficiency, and held Bain & Bro. liable for it.

Nor has the further position taken by counsel at the trial, that Mr. Bain made a *verbal* promise to the counsel of the bank at the time of the transaction of March 31st, 1885, not to discriminate against the bank, in case he made a deed of assignment, anything whatever to do with the validity of the deed. It constituted no lien upon Bain & Bro.'s property. There was nothing to give to it any such effect or operation. The transaction of March 31st, 1885, was in itself a transaction highly favorable to the bank, as shown by Mr. Thom's testimony, before referred to, and the admission of appellant's counsel, placed upon the record (p. 248). It released Bain & Bro. from nothing, and obtained from them very considerable and very valuable securities. How is it possible, then, that there can be any lien or equity growing out of such a promise, in favor of the bank, as against Bain & Bro.'s other creditors? And as was well asked, by the presiding Chief Justice, of the counsel for the Receiver, on the trial of this cause in the lower Court, "Have you offered, in setting up this claim, to give up the "securities you received in the transaction of March 31st, "1885?" It will be remembered that this suit is for the purpose of appropriating the whole trust subject for the benefit of the Exchange National Bank. Such is the object of the suit and the contention of counsel.

Mr. Thom, the counsel of the bank, to whom the promise was made, did not, as is shown by his testimony (cross-questions 5, 6, 7, 9, pages 256-7), look upon this promise as having any such effect as is now claimed for it. And the same is shown by the testimony of Mr. W. W. Old. (Questions 11, 12, 13; pages 292-3-4.)

The contemporaneous views of the counsel who conducted this negotiation ought to be conclusive as to the true character of the transaction. And if there had been fraud or imposition it would have been charged then and should have been charged in the bill.

But the testimony on this point is itself clearly inadmissible, as tending to add to and vary the agreement of March 31st, 1885, and to incorporate in it something additional to it; and accordingly it was excepted to on that ground. It will be remembered, that Mr. Bain was requested by Mr. Thom, but distinctly refused, to embody any such promise in the agreement. It furnishes the most striking instance of the propriety of the rule of evidence, excluding such testimony.

Again, as before stated, this promise is nowhere mentioned in either the bill, or amended bill, nor is there any claim set up or asserted in respect to it; and upon the most familiar principles of pleading it cannot be entertained by the Court. No issue is raised; no rights are claimed as growing out of it; no allusion is made to it.

1 Black, 518, Foster vs. Goddard. "In equity proceed-"ings the proofs and allegations must agree. A party can no "more succeed upon a case proved, but not alleged, than upon a "case alleged but not proved (citing a number of authorities)."

Wait on Fraud. Conv. and Cred. Bills, Sec. 285: "The

"complainant will only be allowed to prove the truth of the "allegations contained in his bill. Evidence relating to other "matters will be excluded upon well-established principles of "pleadings, which require the complainant to state the case, "upon which he seeks relief, to the end that the Court may "learn from the pleading itself whether the creditor is entitled "to the relief prayed, and that the defendant may be advised "as to the matters against which he is to defend."

It is evident, therefore, that in no aspect of the matter can the promise in question have any such effect as is claimed for it; and it was so held.

We ask now the attention of the Court to the consideration of the further question involved, of fraud in law, arising from the face of the deed.

The only other point, which will then remain for discussion, on the appeal of Peters, Receiver, will be that raised by the amended bill, involving the operation of the deed as to such of the Bain property as could be shown to have been bought with the money of the bank. This latter is a question, not of the *validity* of the deed, but of its *operation* as to particular property, and will be reserved for discussion on the cross-appeal (the decision of the lower Court upon this point being the principal ground of the cross-appeal taken by the Trustees).

Is the Deed Fraudulent in Law?

It is objected that it is, on two grounds: First, That by it copartnership and individual assets are comingled indiscrimi-

nately, to pay partnership and individual liabilities; and, Secondly, That the clause allowing creditors, in sales at auction made by the trustees, to use their claims in the purchase of the property offered for sale is objectionable in law. There are several other objections raised in the bill, but they were not alluded to in the argument, and do not require notice.

Commingling of Assets.

The objection of the commingling of social and individual assets is not an open question in Virginia. It has been long since settled and disposed of. It has been twice before the Supreme Court of Appeals, and it must now be considered as at rest. The cases were exactly analogous to this; and the language of the Court, in point of clearness, affirmativeness, and emphasis, leaves nothing to be desired. The deed in such case is to be construed distributively; the partnership assets are to be applied to the payment of partnership liabilities, and the individual assets to individual liabilities.

Let Us Examine the Cases Referred to.

8 Leigh, M'Cullough vs. Sommerville, 415-16-28-29-30-35, decided in 1836.

This was a case in which a member of a copartnership conveyed the copartnership assets and his individual property, to secure copartnership and individual liabilities. The two kinds of property were commingled and jumbled together, and were, in fact, conveyed as if they belonged to the grantor individually. The deed purported on its face to convey his individual property for the payment of individual creditors in two classes, according to a certain order of priority; but as before stated, the whole partnership effects were included as well as the grantor's individual property; and some of the creditors

mentioned in each class were creditors of the firm, there being also creditors of the grantor individually in each class.

"Held. Though the deed neither mentions the partner-"ship, nor distinguishes the social effects and social creditors, "from the individual property and individual creditors of the "grantor, it is yet not fraudulent, either in fact or in law, and "the court of chancery will reform the deed, according to the "probable intent of the grantor, and the justice of the case, "and apply the partnership fund in payment of the partner-"ship creditors, and the individual fund in payment of the in-"dividual creditors, observing the order and preference estab-"lished by the deed."

The reasoning of the Court in this case, in discussing the deed, and the result of its decision, show how averse the Virginia law is to the doctrine of constructive fraud.

18 Gratt., Gordon vs. Cannon, 388, 405, 6-7-8-9, decided in 1868.

In this case the same question came again before the Court, and was fully and elaborately considered, and the decision in "M'Cullough vs. Sommerville" reaffirmed, and strengthened by further argument.

The firm of R. A. & Co. stopped business, and R. & R. two of its members, with P., formed the new firm of R. R. & Co. They failed and conveyed all the assets of both firms, and the individual property of R., in trust to pay indiscriminately the debts of the two firms and a debt of R.; and they required a release. The first preferred debts were those due to creditors mentioned in schedule B; they were debts of R. R. & Co., a debt of R., and a small amount due to the trustee for money paid out by him for costs and legal services; the second preferred debts were embraced in schedule C, and were debts of R. R. & Co. and R. A. & Co. And besides the above there were thirdly preferred creditors, embraced in another schedule.

We refer the Court particularly to the language of the Court of Appeals between pages 405–409 inclusive, disposing in the most emphatic terms of this question, already decided, but raised anew by counsel. At one place the Court, in referring to the deed in controversy, speaks as follows:

"When the grantors made the deed in the terms, in which "it is written, the case of M'Cullough vs. Sommerville fixed "its construction and required it to be read as if it had been "written so as to apply the individual fund in the first place to "the payment of the individual debt, and the partnership funds "in the first place to the payment of the partnership debts re-"spectively. Suppose it had in fact been so written—can "there be a doubt but that the deed would have been valid? "But the legal construction of the deed as actually written is "the same. Why, then, should there be any more doubt in "this case than there was in that, but that the deed is valid?

* * * * * * * * * * * *

"If it was proper in M'Cullough vs. Sommerville, to act upon "the rule of construction, which was established in that case, "a fortiori, it is proper to follow it in this case, after the lapse "of more than thirty years since that decision was made. It "is a fair and reasonable, and not a forced or strained rule of "construction. The deed conveys the assets of two firms in "trust to secure the payment of the debts of both, without ex-"pressing any discrimination. Why may it not be construed "distributively—reddendo singula singulis—so as to require "the assets of each firm to be applied in the first place to the "payment of the debts of that firm? Such a construction "would seem to be consistent with the terms of the deed, and "is necessary to make it valid and effectual. It ought, there-"fore, to be adopted—ut res magis valeat quam pereat."

In view of the above decisions, it seems strange that this

point should have been raised against the deed. It is not made in the bill.

Bidding Clause Valid.

The clause in the deed known as the bidding clause, giving rise to the second objection, has never been brought before the Supreme Court of Appeals of Virginia; although there have been many deeds of assignment containing such clause in the State.

In discussing the validity of this clause, it is proper to examine the Virginia decisions on the subject of constructive fraud, to ascertain the law of that State and the principles governing its decisions upon that question. But before undertaking such examination, let us look at this clause to ascertain its scope and effect as well as its practical operation upon the trust.

In the first place, it in no way conflicts with the first-class creditors, there being ample funds to pay such creditors several times over without making any sales of the real or personal estate; the record and the reports of the Trustees clearly show this. The first-class creditors amount only to $49,881.61. of which the Exchange National Bank holds $42,288.49; (Record, p. 406; and p. 304, q. 39). But if such were not the case, the Trustees are empowered to sell at private sale, and in that way could readily pay the first-class creditors. It should be borne in mind that it is not obligatory upon the Trustees to sell any of the trust property at auction, but that they have equally the right to sell at private sale; and that the bidding clause is only operative in the case of auction sales. As before stated, however, no sales of any kind are necessary to pay the first-class creditors, the trust funds in hand being far more

than sufficient for that purpose. The bidding clause then in no way operates to defeat the prior creditors.

In respect to the second-class creditors, it is a privilege given to all of them. They are all treated alike, and are placed in exactly the same legal relation to the subject matter. The objection that it is a preference is unfounded. There is no preference where the same privilege is granted to all. And the idea that it might enure to the advantage of the large creditors, comes with singular inconsistency from the Receiver of the Bank, when the bank is the largest creditor secured in the class, its claim in this class amounting to $102,000. (Record, p. 304, q. 39). But suppose it were a preference, what then? The grantors had a right to prefer, a right as well assured as any known to the law; and it is difficult to perceive how fraud can be imputed from the exercise of this undoubted right.

The idea of the clause in this deed, as in the other deeds in which it has appeared, is that it enures greatly to the benefit of the creditors; that where the property is large and consists of numerous pieces, which may be subdivided to advantage into parcels and lots (such as lands in close proximity to a city, as was the case here), the creditors in this way are enabled to utilize their claims, and are placed on an equal footing with other bidders. The grantors say in their answer: "In the execution of the said deed of trust these defendants "not only thought it due to their creditors thereby secured to "convey all their property for the use and benefit of their said "creditors, but to give the Trustees such power as to the sale "thereof as to make the property most available and the trust "most beneficial to those secured by the said deed, and also to "put the creditors thereby secured upon the best possible footing. No other object or motive existed in the minds of these "defendants, and no other object or motive can be inferred by

"the most strained construction from the terms of the deed it-
"self; and these defendants are not advised that any creditor
"other than the plaintiff has ever made any objection either to
"the powers vested thereby in the trustees, or to the terms and
"conditions thereof."

The power and authority which may be vested in trustees by deeds of assignment under the Virginia law is very broad; and questions of this sort are questions of administration. No reservation is made in this deed on behalf of the assignors by which they can defeat the trust; and as the lower Court says in its opinion this is not a provision which can in any manner result to the advantage of the assignors in opposition to the creditors.

As to the third and last class, the effect of the clause being to enhance very greatly the distributable value of the assets, it must necessarily be considered as beneficial to that class. Quoting from the opinion of the Circuit Court: "Its "only effect, so far as the deferred creditors are concerned, "must be for their advantage, because the more the property "sells for the greater will be the chance of paying those pre-"ferred in full, and leaving something for those who are un-"preferred," &c. It is true, however, that there is little probability of the assets reaching the third class.

The result of this inquiry then clearly shows that the Exchange National Bank can be in no way injured by this clause: on the contrary, its operation is to benefit that bank.

Let us now look at the Virginia decisions on the subject of constructive fraud.

It will be found on an examination of these decisions that constructive fraud has but little place in the law of that State. Upon this point the law differs materially in the different

States. In Virginia to constitute a deed constructively fraudulent, there must be a *necessary* inference of *fraud* arising from the deed. To illustrate from the two cases already cited on the subject of the commingling of partnership and individual assets: The law of some of the States upon that question is very different from the law in Virginia. It is held in such States that the deed is constructively fraudulent on the ground that partnership assets not being liable for individual debts, cannot be so applied; and the deed in those States is *construed* as undertaking to do that. But in Virginia the deed *is not so construed;* it is not considered as applying the partnership property to individual debts. That is not considered as the necessary or the proper inference deducible from it, the Court saying in the first of the above cases (8 Leigh, 430, McCullough vs. Sommerville) that it does not comport with the mild and beneficent spirit of equity to annul the deed for that cause, the result doubtless of ignorance and mistake, but that each class of creditors should be entitled to its own fund, and thus the real justice of the case reached, as well as the probable intention of the grantor.

The following language of the Court, on page 430 of this case, is also pertinent, used, it is true, in discussing another question, viz., the right of one partner to bind his firm by deed of assignment of the social assets (being personal property): "Suppose (the Court says) this partner had advertised, "that on such a day he would sell off the store goods, the bonds "and all the other property contained in this deed, *and that the "creditors of the firm should have liberty to purchase to the amount "of their debts;* would not such a sale as this have been per- "fectly within his power? As much so, unquestionably, as it "was to sell to a customer a yard of cloth. If, instead of "this, he had given a parol authority, or one in writing under "his hand only, to one or two agents to make sale of the part- "nership stock of goods and other effects, all would agree that "it was an act within his power," &c., &c.

A review of the decisions will show how far the Court of Appeals of this State has gone in sustaining deeds of trust and repelling the idea of constructive fraud, applying as the test of the doctrine a necessary inference or deduction of fraud from the deed. The question has been before the Court in many different phases; and it will be readily seen what the law of the State is. We will state at the outset, that the right of a debtor to make preferences, to exact releases, to clothe the trustees with power to sell, privately or at auction, for cash or on credit, to compromise and compound claims, and the right generally to exercise fully and freely all property rights over his property has been the unbroken law of the State. And where an honest intent on the part of the debtor is shown, to devote his whole property, without reservation or secret trust, for the benefit of his creditors, the deed will be upheld; and the Court will give full effect to such intent, rejecting all artificial or arbitrary tests on the subject of fraud.

26 Gratt., Sipe vs. Earman, 563-6-7.

The syllabus of the case is as follows:

"1. A deed of trust to secure *bona fide* creditors, which "conveys land, horses, cattle, &c., farming implements, house-"hold and kitchen furniture, growing grain and vegetables, "the grantor to retain possession for three years, by paying the "interest on the debts secured, is not fraudulent *per se*, though "made without the knowledge of the creditors secured."

"2. Nor does the execution of the deed pending a suit "against the grantor, by a creditor not secured by it, and a "short time before the term, at which it was probable judg-"ment would be rendered against him, render the deed fraud-"ulent."

"3. Nor does a provision in the deed authorizing a sale of "the property within the three years, at the instance of the "grantor, render the deed fraudulent."

On page 567, the doctrine is laid down: "That the Court "cannot presume fraud unless the terms of the instrument "preclude any other inference." The terms of the deed in question, and the facts of the case, are fully discussed by the Court, and the doctrine applied; and on page 569, the Court says: "This Court has repeatedly sustained the deed, in cases "where it deferred payment for a long period, and the grantor "reserved the right to retain possession of the property, and "to enjoy its rent and profits, though no provision was made "as in this case, for the payment of the annually accruing "interest." And after a further discussion of the objections raised to the deed, the Court on page 570 states as a summary of its opinion, and as an expression of the doctrine to be applied to such cases; "The Court is therefore of opinion "that the reservations on the face of the deed do not raise an "*irresistible presumption* of fraud, which of itself vacates the "deed, and would be notice to the creditors who take under it, "so that they would be affected by it."

11 Gratt., Dance & Seaman, 778.

This was also a deed of trust preferring creditors, and conveyed land, staves, and crops cut and growing, and was not to be enforced for two years, and reserved the profits in the meantime to the grantor, and directed the surplus proceeds of sale after payment of the debts secured, to be paid to the grantor. This was a case in which the grantor was not even required to pay the interest during his possession, and during such possession, viz., for two years, he was to enjoy the profits of the property and estate conveyed; but let us see the principle upon which the Court based its opinion upon this deed:

On page 784 the Court says: "The fraudulent intent is "denied by the grantors, and there is no proof except that "arising from the face of the deed. The Court cannot pre- "sume the fraud, unless the terms of the instrument preclude

"any other inference. As to the *cestuis que* trust, it is not pre-
"tended that they participated in any fraud. They were not
"consulted, and though if the fraudulent intent clearly ap-
"peared on the face of the instrument, they would be affected
"by it, if they claimed under it, the reservations on the face
"of the deed do not raise under the doctrine of this Court an
"irresistible presumption of fraud, which would of itself va-
"cate the deed."

On page 780, of the same case, the Court in speaking of the law as established in Virginia, in respect to the construction of such deeds, says: "But these questions have been set-
"tled by a series of adjudications in this Court. It would
"disturb many titles, if the principles heretofore established,
"and sanctioned by the practice of the country, were now to
"be questioned. If inconvenience results from the construc-
"tion heretofore given to the statute against fraudulent con-
"veyances, the remedy should be administered by the law
"making power. An act of the Legislature would operate
"prospectively, and men could regulate their transactions so
"as to conform to its provisions. But a decision of this Court,
"giving a new and different rule of construction, would have
"a retrospective and therefore unjust operation."

11 Gratt., 348, Cochran vs. Paris.

The first paragraph of the syllabus in this case is as follows: "1. A deed of trust, which among other things conveys
"growing crops of wheat, rye and oats, and which is not to be
"enforced for two years from its date, is not necessarily fraud-
"ulent as to creditors."

The facts of this case would seem to operate strongly against the deed there under consideration, the grantor having it in his power to make way with the growing crops, a part of the trust subject; but the Court in obedience to the principle

laid down, held that it constituted no necessary inference of fraud.

8 Gratt., Lewis vs. Caperton, 148.

The facts of this case and of the several deeds involved in it are instructive. They are sufficiently contained in the first four paragraphs of the syllabus, which are as follows:

"1. A deed executed bona fide to secure a loan of money "not to be enforced for ten years, is a valid deed as against "creditors of the grantor."

2. "A deed, which conveys without a schedule household "furniture, the various kinds of stock on a farm, bacon and "lard, to secure a *bona fide* debt, but not to be enforced for "eighteen months after its execution, is valid against credit- "ors, though the deed was made without the knowledge of "the creditor, and the grantor was indebted to insolvency at "the time of the conveyance."

"3. A deed, which conveys land to secure a *bona fide* "debt, which is not to be enforced for two years, and only then "or afterwards upon a notice of the sale for one hundred and "twenty days, is valid against creditors."

"4. Such a deed is valid, though the execution of the "deed is postponed for five years from the date of the convey- "ance, and the rents and profits of the property in the mean- "time are reserved to the grantor."

This case of itself conclusively shows that the doctrine of constructive fraud has but little place in Virginia law.

1 Gratt., Kevan vs. Branch, 274.

This case furnishes another forcible illustration of the principle. A deed of trust for the benefit of creditors and making preferences among them was executed by the debtor conveying land and personal effects of various kinds, and debts without specification, either in the deed or by schedule; the grantor

was to remain in possession for six months, and the deed required a release from creditors—still the deed was pronounced valid. In this case the counsel of the creditors attacking the deed pressed strongly the idea that the grantor remaining in possession of the personal effects, and especially the unspecified and unscheduled debts, had it in his power to waste the trust subject; but the deed was held good. There was no *necessary* inference of fraud.

13 Gratt., Wickham, &c., vs. Lewis, Martin & Co., 427, 428.

This also was a general trust to secure creditors, and provided for a sale either publicly or privately; for cash or on credit; with right to the trustee to compromise or compound claims; the grantor reserving authority to occupy and use the dwelling house and furniture until the 1st April of the following year; and requiring a release from creditors in order to entitle them to share in the trust.

It was a case, too, in which part of the trust subject was acquired by the grantor fraudulently; and the first paragraph of the syllabus is as follows: "An insolvent merchant pur-"chases goods not intending to pay for them, and after getting "possession of them he conveys them and all his other estate "in trust for the payment of his debts, the trustee having no "notice of the fraud. The trustee is a purchaser for value "without notice."

31 Gratt., Brockenbrough vs. Brockenbrough, 590–1.

This is a recent case decided a few years ago, and it may be well to call attention to the reasoning of the Court, and the language used, laying down in the most emphatic terms the principle upon which the Virginia Courts act in cases of this kind. On page 590 the Court proceeds, as follows: "It is

"contended, in the first place, by the learned counsel for the "appellants, that this deed is fraudulent on its face. There "is no doubt that the provisions of a mortgage or deed of "trust may be of such a character as of themselves to furnish "evidence sufficient to justify the inference of a fraudulent in- "tent. Such is the case where the grantor reserves a power "over the property conveyed incompatible with the avowed "purposes of the trust and adequate to the defeat thereof. This "principle was enunciated in Lang vs. Lee and others, 3 Rand., "410, and has been repeatedly recognized by this Court in "subsequent decisions (citing them). While, however, the "principle referred to is established by these decisions, it is "equally well settled, in this State at least, that no *irresistible* "*inference* of an intent to defraud is deducible from a provi- "sion in a deed of trust postponing a sale of the property convey- "ed for a reasonable length of time and reserving the use of the "property to the grantor until sale, even although a portion of "the property conveyed may be perishable in its nature and con- "sumable in the use; nor is such inference a *necessary deduc-* "*tion* from the omission to annex a schedule or inventory of "the property to the deed; nor is the inference a necessary "one when all these circumstances exist in the same case; "(citing a number of authorities). I do not mean to say that "these circumstances, apparent by the deed when taken in "connection with extrinsic evidence, are not entitled to weight "in determining the question of intent. I think they are so "entitled; but alone they are not sufficient to establish fraud. "They are consistent with an honest purpose. The presump- "tion of law is in favor of honesty, and 'the Court cannot pre- "sume fraud, unless the terms of the instrument preclude any "other inference.' Allen J., in Dance and others vs. Seaman "and others."

The Court then in discussing the deed shows that while the grantor may have been mistaken as to his legal rights in

conveying crops to be thereafter grown on the land, and while he was in possession, still that did not invalidate the deed; and says, that to so hold would be a "harsh inference," and that "a man may well mistake the law in such a case, and be innocent."

75 Va. Rep., Williams vs. Lord & Robinson, 390, 400.

"The Court cannot presume fraud, unless the terms of the "instrument preclude any other inference."

82 Va. Rep., Young, &c., vs. Willis, &c., 293-7-8. This is also a late case arising under a deed of assignment for creditors, and the following is from the language of the Court:

"The right to prefer one creditor over another results "from the ownership of the property and the unrestricted "power of alienation. The debtor, if no lien has attached, "can sell it or transfer it to any creditor or purchaser, and "apply the proceeds to any creditor he may desire; and if he "may do so with the property or its price, there would seem to "be no good reason why he should not have the right to cover "it by a deed of trust for the same purpose. That the reser- "vation of an interest in the property by postponing the time "of the sale, or directing a sale on credit, or providing for the "payment of the surplus after satisfying the creditors secured, "do not of themselves furnish evidence of a fraudulent intent, "has been affirmed by the repeated decisions of this Court."

"The fact that creditors may be delayed or hindered, is "not of itself sufficient to vacate such deed, if there is absence "of fraudulent intent. Every conveyance to trustees inter- "poses obstacles in the way of the legal remedies of the credit- "ors, and may to that extent be said to hinder and delay "them. * * *"

"In this case there is no proof whatever, except such as

"may be found upon the face of the deed. This Court cannot "presume fraud unless the terms of the instrument preclude "every other inference. The sale is postponed in the deed in "question for three years; this period was held reasonable by "this Court in a recent case. Sipe vs. Earman, 26 Gratt., 568."

Va. Law Journal, Vol. 13, 1889, Paul vs. Baugh, p. 297.

This was another deed of assignment, postponing the sale, and objected to on that and other grounds, and the following is from the syllabus:

"In the absence of fraud, which must be proved with "clearness and certainty, the execution of such a deed, pend- "ing a suit against the grantor by a creditor, and a short time "before the time at which it is probable judgment will be en- "tered against him, does not of itself vitiate the deed."

"A case in which a deed to secure creditors postpones the "sale of the property conveyed for eleven months, the grantor "therein reserving to himself during that time the right to "remain in possession and receive the profits thereof; at the "end of which time the property might be sold at the request "of any creditor. Held: such provision does not of itself "invalidate the deed."

"The fact that the trustee in a deed securing creditors "wrote the deed, acting as counsel for the grantor, and also as "Clerk of the Court admitted the same to record does not "invalidate such deed."

Possession, usufruct, postponement of sale, execution of deed during suit, even mistake of grantor as to his right to convey crops to be grown while he might be in possession, even possession of unspecified and unscheduled personal assets and debts, none of these things constitute fraud under the Virginia law.

To use the language of the Court in the cases cited, to

constitute constructive fraud upon the face of a deed, there must be an "*irresistible inference*," a "*necessary deduction*" of fraud, and no such inference or deduction can be made unless the "*terms of the instrument preclude any other inference.*"

In the light of these decisions, what is there in this clause to make the Bain deed fraudulent? It cannot operate to defraud, and it is clear that it was not so intended. The object of the clause is manifest. It was supposed to be greatly for the benefit of the creditors. It was to enable them to utilize their deposits in bidding; and was intended to prevent a sacrifice of the property, and to put the creditors on a footing with other bidders to the extent of their claims. This would be of no little advantage in a country community, among a people whose ready money consisted principally of what they had had on deposit with Bain & Bro. And this was a privilege given to all of the second class creditors, which could not injure the first class, and which enured directly to the benefit of the third class.

The judicial mind will refuse to accept as the measure of this case any such artificial test as is here set up, especially when the clause in question is not necessary for the execution of the trust; and when there is no pretence that under such clause any wrong could result to the appellant. Still he is here insisting that the deed shall be set aside and annulled, and the whole trust subject and assets of Bain & Bro. turned over to him, and to the exclusion of every depositor and other creditor of Bain & Bro. Such is the object of this suit, and the claim here asserted.

The depositors alone of Bain & Bro. amount to $900,000, and the whole trust assets are estimated at between four and five hundred thousand dollars only. And it will be noted that a suit is now pending (upon a cross bill filed in this cause and a part of this record), brought by these trustees for the

administration of this trust; and the whole subject matter is now before the Circuit Court to be administered under its orders and according to its direction.

Effect if the Clause were Invalid.

We have thought it proper to discuss each question in this case as presented; but let us inquire now what would be the effect on the deed, if the clause were invalid.

It is a question of administration, and not of the validity of the deed. It is one of two means pointed out under the deed of executing the trust. It is the case of an invalid *separable* clause, which does not permeate the deed, and is not essential to its efficacy. It may be stricken out, and the scheme of the grantors carried out, and according to their intent. The trustees are given the right by the deed to sell either at public auction, when the clause would operate, or at private sale, when it would not operate. It is embraced clearly within the principle laid down by the authorities upon this point, and furnishes the best illustration of it.

The doctrine is, in case of alternative dispositions in a deed or will, good in part and bad in part, that the part valid shall remain and the deed stand, if it work such a distribution of the property, as is in accordance with, or not variant from the grantor's intention; or if the part valid would still have stood, had the grantor been made aware of the invalidity of the rest. This is the case here, as the trustees have the right at pleasure to pursue either mode of sale.

The reason of the doctrine is plain. In the case of fraud in fact, or actual fraud, there can never be any severance. The actual fraudulent intent vitiates the transaction. But in con-

structive fraud, if the part constructively fraudulent be severable and not necessary to the scheme of distribution, upon what principle should it vitiate and annul the whole transaction?

Accordingly we find the distinction taken and the doctrine so laid down.

22 Wend., Darling vs. Rogers, &c., 483-8-9, 490-3-4-5-6.

The head note of the case is as follows: "An assignment "of real estate for the benefit of creditors, upon trust to sell or "mortgage the same and apply the proceeds to the payment of "debts, is a valid instrument under the statute of uses and "trusts as to the trust to sell, notwithstanding that the trust "to mortgage, being for the benefit of creditors-at-large, is "void. The rule, *ut res magis valeat quam pereat*, governs in "such a case, and applies as well where what is void is declared "so by statute, as when it is so at common law, unless the pro-"hibitory enactment declares that the deed by which the "things be done shall be void."

And the following language of the Court will be found not inapt: "In framing this statute I have no doubt the re-"visors had in view the remarks of Lord Chief Justice Hobart "in the Earl of Clanricard's case, Hob. R., 277. He says: "I "do exceedingly commend the Judges that are curious and "almost subtil, astuti (which is the word used in the proverbs "of Solomon, in a good sense, when it is to a good end) to in-"vent reasons and means to make acts according to the just "intent of the parties, and to avoid wrong and injury which "by rigid rules may be wrought out of the act." This remark is cited and approved by Lord Chief Justice Hale in Crossing vs. Scudmore, 1 Ventr., 141, and again by Willes, Ch. J. in Roe, ex dem. Wilkinson vs. Tranmarr, Willes, R. 682, 4; 2 Wils., 75, 78. Willes Ch. J. in the latter case cites Shep. Touch. 82-3. At page 87 of that work, Rule 5, on the con-

str uction of deeds, is thus laid down: that it be such "as the "whole deed and every part of it may take effect, and as much "effect as may be to that purpose for which it is made, so as "when the deed cannot take effect according to the letter, it "be construed so as it may take some effect or other." The rule is well illustrated in Bredon's case, 1 Rep., 76, where several cases are given of attempts to grant estates of greater extent than the grantors had power to convey, and yet the grants were held good to the extent of their power. Apply the rule in Shepard's Touchstone. Here is a deed which conveys Thomas Darling's estate in trust to sell; it then adds a trust to mortgage, which is void. Shepard says: "Let it "receive as much effect as may be to that end for which it was "made." Here let it have the effect to create a trust to sell for the benefit of creditors, though Darling had no power to say they might also mortgage. This rule is the same, whether the restraint be imposed by a statute or the common law. That was distinctly held in Dee, ex dem. Thompson vs. Pitcher, 2 Marsh., 61; 6 Taunt., 369."

16 Wend., Salmon vs. Stuyvesant, 328-333.

In this case the question arose under a will, and after discussing the subject the Court uses the following ianguage, on page 332: "The case of Lorillard is relied upon by the "appellant, as in principle overturning the whole of this will. "The rule of that case was said to be that a failure in part is "fatal to the entire instrument; that the intent of the tes- "tator, the soul of the will, is indivisible; that the whole must "be effectuated or its identity is lost, and it can no longer be "known and traced by the law. That case holds no such "doctrine. Such a decision, in that or any other cause by "this Court, would operate as a sentence of nullity against the "more important class of wills. No will of any considerable "estate, embracing various kinds of property and seeking to

"provide for a numerous family by the bestowment of differ-
"ent interests, could ever stand the test of such a principle."

9 Paige, Parks vs. Parks, 108, 116, 117 (top paging).

On page 117 the Court says: "It is also a well settled "principle of law that where a will contains distinct and in-"dependent provisions, devising different portions of the tes-"tators property, or distinct estate or interests in the same "portions of the property, some of which provisions are con-"sistent and others inconsistent with the rules of law, the "former will be permitted to stand, although the latter are "declared to be illegal and void; except where they are so "dependent on each other that they cannot be separated. And "in the recent case of Darling vs. Rogers and Sagory (22 "Wend., Rep. 483) it has been settled by the Court of dernier "resort that where real estate is awarded upon two or more "trusts, some of which are legal and the others are void or "unauthorized by law, the title passes to the trustees so far as is "necessary for the purposes of the authorized trusts; notwith-"standing the provision of the Revised Statutes, which de-"clares that where an express trust shall be created for any "purpose not authorized by those statutes, no estate shall vest "in the trustee."

15 New York, Curtis vs. Leavitt, 12, 96-7, 123-4.

On pages 96-7: "Now, a doctrine which is expressed in "the words 'void in part, void in toto,' has often found its way "into books and judicial opinions as descriptive of the effect "which a statute may have upon deeds and other instruments "which have in them some forbidden vice. There is, how-"ever, no such general principle of law as the maxim would "seem to indicate. On the contrary, the general rule is that "if the good be mixed with the bad it shall nevertheless "stand, provided a separation can be made."

And again referring to the case of Doe vs. Pitcher, 6 Taunt, 363, the Court says: "That case not only affirms the "construction I have indicated, but contains an unanswerable "refutation of the maxim 'void in part, void in toto,' or rather "of the uses to which that maxim has sometimes been very in- "accurately applied. Without pursuing this question fur- "ther, the following additional authorities may be referred to: "Collins vs. Blantern (2 Wilson, 348); Pigott's cases (11 Coke, "27); Darling vs. Rogers (22 Wend., 487); Patterson vs. Jenks "(2 Peters, 235); Norton vs. Simmes (Hobart, 12c.); Mackie vs. "Cairns (5 Cow., 564, per Sutherland, J.)."

36 New York, Harrison vs. Harrison, 543, 547-8.

This case is an instructive one, and attention is called to the language of the Court on pages 547-8:

"The principle is now well settled that the courts lean in "favor of the preservation of all such valid parts of a will as "can be separated from those that are invalid, without defeat- "ing the general intent of the testator. (Post vs. Hover, 30 "Barb., 313: 33 N. Y., 593; 17 Id, 561, 576; Darling vs. Ro- "gers, 22 Wend., 483: Gott vs. Cook, 7 Paige, 521; S. C., 24 "Wend., 641, 664; De Peyster vs. Clendening, 8 Paige, 295; "Haxtun vs. Corse, 2 Barb. Ch. R., 506; Van Vechten vs. Van "Vechten, 8 Paige, 120; Gilman vs. Redington, 24 N. Y., 9; "Everett vs. Everett, 29 Id., 99."

"It is no objection to the application of this rule to the "case at bar, that the limitations, as well those which are good "as the one alleged to be bad, are embraced in a single trust. "A single trust created for two purposes, one lawful and the "other unlawful, is good for the lawful purpose although void "for the unlawful one. In Darling vs. Rogers (*supra*) the "trust was single, viz., to sell or mortgage the assigned estate "for the benefit of creditors; and it was held to be a good and "valid trust to sell, but void as a trust to mortgage. The trust

"in Haxtun vs. Corse (*supra*) was the case of a single trust for "two purposes, viz., to lease and sell, one lawful and the other "unlawful; and the trust to sell was held to be valid, while "the other was declared to be void. In Savage vs. Burnham "(*supra*), as we have seen, the trust was a single trust, em- "bracing both lawful and unlawful purposes, and it was sus- "tained as to the lawful purpose, while for the unlawful pur- "pose it was adjudged to be void. And the same rule was "recognized and applied in Gilman vs. Redington, Post vs. "Hover, and Everett vs. Everett (*supra*)."

24 Wend., Kane vs. Gott, 661.

"The most able and safe judges have said that the Courts "should be astute in allowing it a comprehensive operation "for the giving effect to all instruments, and especially to last "wills and testaments; and though some parts may be con- "trary to the rules of law, yet all other parts should be saved. "Any Court acting systematically upon the opposite principle, "would be a great evil."

2 Barb. Ch. Rep., Haxtun vs. Corse, 519.

"For, where a will contains different trusts, some of which "are valid and others void, or unauthorized by law, or where "there are distinct and independent provisions as to different "portions of the testator's property, or where different estates "or interests in the same portions of the property are created, "some of which provisions, estates or interests, are valid, and "others invalid, the valid trusts, provisions, estates or interests, "created by the will of the testator will be preserved; unless "the valid and the invalid are so dependent upon each other "that they cannot be separated without defeating the general "intent of the testator. (Darling vs. Rogers & Sagory, 22 „ Wend. Rep., 483. Parks vs. Parks, 9 Paige's Rep., 117.)"

5 Sand. Sup. Ct. Rep., Long vs. Ropke, 371.

"The doctrine that an express trust with all its powers "and incidents is rendered void by the invalidity of any one of "the several distinct and independent purposes, for which it is "created, we rejoice to say, may now be considered as decisively "and completely overruled," citing cases. "Root vs. Stuyve- "sant is an anomalous case to be rejected and shunned, not to "be followed as an authority; it ought never to bo quoted."

And what is said in regard to "Root vs. Stuyvesant," by Denio, J., in Williams vs. Williams, 4 Seld., 539, is pertinent: "Root vs. Stuyvesant (18 Wend., 257,) was decided on the "ground that the power given to the devisee for life, to make "leases for sixty-three years, was so important a feature in the "testator's scheme as made it quite certain that he would have "made a different disposition of the property had he known "that such a power was illegal. This was determined by a di- "vided vote, against the opinion of all the *judges*. Still it is a "precedent for similar cases; but not for such an one as the "present, *where the part of the testimentary provision which is "left, is quite consistent with the testator's general intention.*"

59 N. Y., Van Schuyler vs. Mulford, 432.

Allen, J., in discussing the question on page 432, says: "It was not intended to question this doctrine in Knox vs. "Jones (*supra*). On the contrary it was reaffirmed and Manice "vs. Manice (43 N. Y., 303,) cited to the rule that a void trust "which is separable from other valid trusts may be cut off when "the trust thus defeated is independent of the other disposi- "tions of the will and subordinate to them, and not an essen- "tial part to the general scheme."

And for still further illustrations of the principle, that "void trusts" and "void directions" may be lopped off, when

separable, and not necessary or essential to the scheme of the instrument, see:

43 N. Y., Manice vs. Manice, 384.

15 N. Y., Kirkpatrick vs, Johnson, 322.

65 How. Prac. Rep., Leavitt vs. Wolcott, 57.

The last case being a very recent exposition of the law on the subject.

2 Tucker's Com. on the laws of Virginia, 432, (top paging).

The doctrine and the reason of it are found stated here also, and the difference between fraud in fact and constructive fraud in their effect. The author says, that when "fraudulent "in fact, the guilty party can hope nothing from the pure "hands of a court of conscience, but when the deed is only con- "structively fraudulent, it is otherwise."

128 U. S., Dening vs. Bennett, 496.

In this case, Mr. Justice Miller, in discussing the effect on the deed of the clause directing the surplus to be paid over to the assignors, says:

"But it is said in answer to this view of the subject that "there is a clause in the instrument now before us directing "that if there shall be a surplus after payment in full of all "the creditors who shall release the assignors, it shall be paid "over to the latter. There are two answers to this. If that "clause or provision is unlawful and violates the laws of the "State of Minnesota, or the Constitution of the U. S., it can "be rejected, and the remainder of the assignment permitted "to stand." This case is also instructive as to the control of an insolvent debtor over his property.

10 Pet., United States vs. Bradley, 344.

The following is a part of the head note of this case: "That bonds and other deeds may, in many cases, be good in

"part and void for the residue where the residue is founded "in illegality, but not malum in se, is a doctrine well founded "in the common law, and has been recognized from a very "early period. The doctrine has been maintained, and is set- "tled law at the present day; in all cases where the different "covenants or conditions are severable, and independent of "each other, and do not import malum in se."

"There is no solid distinction in cases like the one before "the Court between bonds and other deeds containing condi- "tions, covenants or grants, not malum in se, but illegal at "the common law; and those containing conditions, cove- "nants or grants illegal by the express prohibitions of statutes. "In each case the bonds or other deeds are void, as to such "conditions, covenants or grants, which are illegal; and are "good as to all others which are legal and unexceptionable in "their purport. The only exception is, when the statute has "not confined its prohibitions to the illegal conditions, cove- "nants or grants; but has expressly, or by necessary implica- "tion, avoided the whole instrument to all intents and pur- "poses."

And Mr. Justice Story, in delivering the opinion of the Court, discusses this question, citing a number of authorities, and holding that it is settled law, obtaining as well in regard to statutory bonds and deeds as to common law bonds and deeds. The bond in that case was a bond taken or purporting to be taken under a statute, and it was conceded that as to bonds or deeds at common law the principle was beyond dispute. The reasoning of the Court is found between pages 360 and 365.

And the same doctrine is recognized and enforced in the construction of statutes.

We submit, therefore, that the effect of this clause upon the deed, even if invalid, (which we think we have clearly

shown, is not the case), would not be to invalidate the deed.

The language of the late Chief Justice, in delivering the opinion of the Circuit Court upon this point, is as follows: "The only question we have now to consider, therefore, is "whether this particular provision is fatal to the whole assign- "ment. There is nothing whatever in the instrument to show "that if it had been supposed this direction to the assignees "could not legally be followed, the assignment would not "have been made in its present form with this provision left "out. On the contrary, everything looks the other way, for "the assignees are authorized to sell at either public or private "sale according to their discretion, and it is only when the "sale is public that the bidding clause becomes operative. "The evident purpose was to stimulate bidding, not to give "one creditor an unconscionable preference over another, nor to "secure any special advantage to the assignors. It is not such "an essential part of the scheme of the trust as to make it "vital."

"At most it is a mere appendage which may be lopped "off without injury to the main purpose of the instrument. "Its only effect, so far as the deferred creditors are concerned, "must be for their advantage, because the more the property "sells for the greater will be the chances of paying those pre- "ferred in full, and leaving something for those who are un- "preferred."

Argument on the Cross Appeal.

JOHN T. GRIFFIN, WM. W. OLD AND JOHN B. JENKINS, *Trustees*, vs. WM. H. PETERS, *Receiver of Exchange National Bank of Norfolk.*	CROSS APPEAL.

We come now to the consideration of the question raised by the amended bill, viz., the purchase by Bain & Bro. of certain of their property with the money of the Exchange National Bank, and the traceability of the money into the property.

The special master to whom was referred this matter, reported certain of the property as having been purchased with the money of the Exchange National Bank; the present value of which is about $20,000.

The Circuit Court by its decree (page 433 of the record) in effect adopted the report of the matter as to the property traced (the details of the difference being unimportant here), and in this connection uses the following language: "But it "further appearing to the Court for reasons also stated in their "said opinion in writing, that as to money of the Exchange "National Bank used by Bain & Bro., or any of the members "of said firm in the purchase of property in the hands of the

"said trustees and traced into such property, there was a re-
"sulting trust and equity in favor of the said bank, of which
"the said trustees are to be considered as having had construc-
"tive notice, but that it has been impossible to trace the
"money obtained from the said bank, by the said firm or any
"of its members, directly into property in the hands of said
"trustees, except in the instances set out in the said written
"opinion of the Court," &c.

The decree then sets out the property in question, and proceeds as follows: "And no money having been used in the "purchase of the items of property hereinbefore just set out "other than such as was taken directly from the bank for that "purpose; and under these circumstances the said items of "property standing in the place of the money used; the "Court is of opinion and doth declare that the said Wm. H. "Peters, Receiver of the Exchange National Bank, is entitled "to a surrender by the said trustees of such of the property "hereinbefore set out, and found to have been actually pur-"chased with the moneys of the said bank, as he elects to take; "and the Court doth adjudge, order and decree that the "said trustees do surrender to the said William H. Peters, Re-"ceiver, such of the said property hereinbefore set out and "found to have been actually purchased with the moneys of "the said bank, as he elects to take; and by making said elec-"tion and receiving such property the said Receiver is not to "be estopped from receiving the full benefit of the said deed "of trust, or the provisions thereof in favor of the Exchange "National Bank, and the Court doth so adjudge, order and "decree."

We submit that it was error to decree that the Receiver could take the property traced, and would not be estopped from receiving the benefit of the deed. And this is our first assignment of error, and the principal question involved in

the cross appeal by the trustees; for if we are right in our position, the Receiver will, of course, elect to take under the deed, the whole property found by the Court to have been traced being only of the value of about $20,000, while under the deed the Receiver is the largest creditor, coming in for about $43,000 in the first class, which he would get in full, and for $102,000 in the second class, as to which he would be upon an equal footing with the other creditors, the depositors of Bain & Bro.

Is the decision of the Court that the receiver is entitled to take the property traced, as well as to claim under, and to receive the benefit of the deed, in accordance with the law upon this point?

The Doctrine of Election.

This doctrine is well stated by the Supreme Court of Appeals of Virginia in a recent case.

30 Gratt., Gregory vs. Gates, 84, 88, 89-90.

'The doctrine of election may be thus stated: That he "who accepts a benefit under a deed or will must adopt the "whole contents of the instrument, conforming to all its "provisions, and renouncing every right inconsistent with it. "If, therefore, a testator has affected to dispose of property "which is not his own, and has given a benefit to the person "to whom that property belongs, the devisee or legatee ac-"cepting the benefit so given to him must make good the "testator's attempted disposition; but if on the contrary, he "choose to enforce his proprietary rights against the testator's "disposition, equity will sequester the property given to him "for the purpose of making satisfaction out of it to the person "whom he has disappointed by the assertion of those rights.

"1 Jarman on Wills., 384 (marg.), and cases there cited. And "it is immaterial whether the testator, in disposing of that "which is not his own, is aware of his want of title or pro- "ceeds upon the erroneous supposition that he is exercising a "power of disposition which belongs to him; in either case "whoever claims in opposition to the will must relinquish "what the will gives him. Id. 387." Pages 89 and 90.

And the doctrine applies equally to deeds as will appear; and to enable a creditor to claim under a deed, he will not be allowed to contest the intended operation or effect of such deed. In this case the Bains, who had bought the property in question, taken it in their name, and treated it as theirs, and in whose name it had stood for years, evidently intended that it should pass under their deed of assignment. Of that there can be no question. The creditor therefore claiming such property claims directly against the deed, and brings himself within the principle so clearly laid down in "Gregory vs. Gates." It is true that in "Gregory vs. Gates" the Court decided that as to one-third of the farm called Seguine, not standing in the testator's name, but in the name of his children by his first wife, they were not put to an election, giving as the reason that, "there is nothing on the face of the will, taking all its "provisions, and construing it as a whole, which indicates "clearly or by necessary implication that the testator intended "to dispose of any part of Seguine not his own, or that his "disposition as to Seguine was not confined to the two-thirds "which he owned in fee simple." But the Court decided that as to the one-third of the timber cut from the estate and belonging to the said children, the proceeds of which the testator invested in his own name, the children were put to their election. (Pages 84, 88). In the case at bar, none of the property conveyed by the deed is scheduled or specifically set out; but it is clear that the grantors intended and undertook to convey

the property traced as much as any other property conveyed by the deed. To suppose otherwise would be wholly to depart from the facts. It had been in their name for years, and treated as such by them. And it must be remembered that the question is, what the grantors intended and undertook by their deed to do? The doctrine is based upon the idea of the grantors undertaking to do that which they had not the right to do. It may not be out of place at this point to set out the language of the deed describing the property undertaken to be conveyed:

"That the said parties of the first part do grant unto the "said parties of the second part, all and singular, the following "property, to-wit: All the assets and property of every kind "whatsoever, real, personal and mixed, both of the said late co- "partnership of Bain & Bro., composed as aforesaid of the said "Robert T. K. Bain, George M. Bain, Jr., James G. Bain and "Thomas A. Bain, deceased, and of the present copartnership "of Bain & Bro., composed of the said Robert T. K. Bain, "George M. Bain, Jr., and James G. Bain, including all the "notes, bonds, bills, accounts, credits, stocks, moneys, office "furniture, farming implements and utensils, horses, mules, "wagons, carts, trucks, and all other personal property of every "kind and description whatsoever, whether standing in the name "of Bain & Bro. or of any or either of the said parties as individ- "uals, and including all the real estate wherever situated, "whether standing in the name of Bain & Bro. or of any of "the partners, either of the old firm or of the present firm of "Bain & Bro. Also all the real estate standing in the name "of or belonging to the said Robert T. K. Bain, either at law "or in equity, situated in the city of Portsmouth, in the county "of Norfolk, in the county of Nansemond, in the county of "Southampton, in the county of Princess Anne, or wherever "else situated, it being the object and intention to embrace "and include all and every part of the real estate standing in

"the name of the said Robert T. K. Bain, or to which he is en-
"titled at law or in equity, wherever situated. Also the per-
"sonal property of the said Robert T. K. Bain of every kind,
"character and description whatsoever, wherever found; also
"all the real estate standing in the name of or belonging to
"the said George M. Bain, Jr., either at law or in equity,
"whether situated in the city of Portsmouth or the county of Nor-
"folk or elsewhere, and also all the personal property of the said
"George M. Bain, Jr., of every kind, character and description
"whatsoever, wherever found; also all the real estate standing
"in the name of or belonging to the said James G. Bain, either
"at law or in equity, whether situated in the city of Ports-
"mouth or county of Norfolk, or elsewhere, and also all the
"personal property of the said James G. Bain, of every kind,
"character and description whatsoever, wherever found, it
"being the object and intention of this deed to convey all the
"property of every kind whatsoever, real, personal and mixed,
"wherever situated or found, of the late firm of Bain & Bro.,
"of the present firm of Bain & Bro., and of the individual
"members of the said present firm of Bain & Bro."

See also:

14 Gratt., Dixon vs. M'Cue, 549.

76 Va. Rep., Rutherford vs. Mayo, 123.

Both of these cases cite with approval the following language from Gibson vs. Gibson, 17 E. L. & E. R., 349: "A per-
"son, who is entitled to any benefit under a will or other in-
"strument, must, if he claims that benefit, abandon every right
"or interest the assertion of which would defeat, even par-
"tially, any of the provisions of that instrument."

76 Va. Rep., Penn vs. Guggenheimer, 846.

"The doctrine of election is said to rest upon the equita-
"ble ground that no man can be permitted to claim inconsist-

"ent rights with regard to the same subject, and that any one "who asserts an interest under an instrument is bound to give "full effect, as far as he can, to that instrument. Or, as it is "sometimes expressed, he who accepts a benefit under a deed "or will must adopt the contents of the whole instrument, "conforming to all its provisions and relinquishing every right "inconsistent with it."

"In the terse language of Lord Rosslyn, in Wilson vs. "Lord Townsend, 2 Vesey Jun., 697: 'You cannot act; you "cannot come forth to a court of justice claiming in repug-"nant rights. When you claim under a deed you must claim "under the whole deed together; you cannot take one clause "and advise the court to shut their eyes against the rest. Sup-"pose in a will a legacy is given to you by one clause; by an-"other an estate of which you are in possession is given to an-"other. While you hold that you shall not claim the legacy.' "Pomeroy's E. Jur., sections 465, 466; Leading cases in Equity, "vol. 1, part 1, 541, 547, 548; Kinnard, Ex'or. vs. Williams, 8 "Leigh, 400; Craig's heirs vs. Walthall, 14 Gratt., 518; Dixon "vs. McClure, Id., 540."

128 Mass., Watson vs. Watson, 154-5.

"Gray, C. J. The principle on which the respondent re-"lies was thus stated by Chief Justice Shaw: 'It is now a well "settled rule in equity, that, if any person shall take any bene-"ficial interest under a will, he shall be held thereby to confirm "and ratify every other part of the will, or, in other words, a "man shall not take any beneficial interest under a will, and "at the same time set up any right or claim of his own, even "if otherwise legal and well-founded, which shall defeat or in "any way prevent the full effect and operation of every part of "the will. Hyde vs. Baldwin, 17 Pick., 303, 308."

"In this Commonwealth it has been decided, in accord-"ance with the opinions of Lord Mansfield, Lord Loughbor-

"ough and Lord Redesdale, that the rule holds good at law as "well as in equity. Smith vs. Smith, 14 Gray, 532. Brown "vs. Brown, 108 Mass.. 386. Hapgood vs. Houghton, 22 Pick.' "480, 483. Doe vs. Cavendish, 3 Doug., 48, 55. S. C. 4 T. R. "741, 743, note. Wilson vs. Townshend, 2 Ves. Jr., 693, 696. "Birmingham vs. Kirwan, 2 Sch. & Lef., 444, 450."

2 Herman on Estoppel, &c., page 1156, sec. 1028.

"The doctrine of election is founded upon the principle "that there is an implied condition, that he who accepts a "benefit under an instrument must adopt the whole of it, con-"forming with all its provisions, and renouncing every right "inconsistent with them. The principle is recognized and es-"tablished in this country almost precisely the same as in "England, and rests upon the equitable ground that no man "can be permitted to claim inconsistent rights with regard to "the same subject, and that any one who claims an interest "under an instrument is bound to give full effect to that in-"strument as far as he can. A person cannot accept and re-"ject the same instrument, or having availed himself of it as "to part, defeat its provisions in any other part; and this ap-"plies to deeds, wills and all other instruments whatsoever." And numerous cases cited.

17 Serg. & Raw., Irwin vs. Tabb, 423.

"Now there is no rule of equity more universal in its ap-"plication, or more just in its consequences, than that a party "shall not claim in repugnant rights, and that he who takes "the benefit shall also bear the burden. It would be an affec-"tation of learning to cite authorities for this. The books are "full of cases which show that a party shall not contest the "validity of an instrument from which he draws a benefit, nor "affirm it in part and disaffirm it in part."

"Here, the plaintiff, or Mrs. Tabb, under whom he claims,

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"Here, the plaintiff, or Mrs. Tabb, under whom he claims,

"might have repudiated the whole transaction, and stood on "her former rights; but claiming to participate in the benefit, "she can be admitted only on the terms prescribed by the "mortgagor; and the only subject of inquiry is as to the na- "ture and extent of those terms."

1 Rawle, Adlum vs. Yard, 170–1 [top paging].

"It has been pressed on us that a contract forbidden by a "statute is incapable of confirmation, except on terms which "render it consistent with the statute, and for a new consid- "eration. No one can doubt it. But surely the acceptance "of a dividend under a deed of trust is a new and perfect con- "sideration. Any one may waive the advantage of a law in- "troduced for his own benefit; and I cannot imagine why "creditors may not ratify a contract fraudulent only as to "themselves, even in anticipation of a benefit. But where "money is actually received, and on an implied condition that "the receiver shall not question the title, every principle of "natural justice requires that the condition should be per- "formed. The doctrine of election is more analagous to es- "toppel than confirmation; and an estoppel may arise as well "from matter *in pais* as matter of record."

89 N. Y., Chapin vs. Thompson, 278.

"The assignor created his own trust, and a creditor who "comes in to claim a share under it must be content to take "such share of it as the assignor intended to give him."

2 Sch. & Lef., Moore vs. Butler, 267.

"No person puts himself in a capacity to take under an "instrument without performing the conditions of the instru- "ment; and they may be express or implied; if it is stated, or "can be collected, that such was the intention of the parties to

"the instrument, that intention must be complied with."

In the same volume, page 550, in the case of Birmingham vs. Kirwin, Lord Redesdale in delivering the opinion of the Court says: "The rule of election I take to be applicable "to every species of instrument, whether deed or will, and to "be a rule of law as well as of equity."

Bigelow on Estoppel (1882), 574, top paging: "And upon "a principle similar to that applied to persons taking under "wills, beneficiaries under a trust are estopped by claiming "under it, to attack any of its provisions. So also one who "accepts the terms of a contract, must accept the contract as "a whole. He cannot accept part and reject the rest."

Burrill on Assignments, Sec. 479.

"*Consequence of coming in.*—By coming in under a vol- "untary assignment, the creditors express their election to ac- "cept of its provisions, and are considered as acquiescing in "the disposition directed by the assignor to be made of the "proceeds of the property. Thus, where some of the debts "directed by the assignor to be paid are usurious, other credi- "tors claiming under the assignment cannot on that ground "object to their allowance." "In the case of a voluntary as- "signment," observes Chancellor Walworth, "where the as- "signor creates his own trusts, a creditor who comes in to claim "a share of the fund under it, must be contented to take such "share of it as the assignor intended to give him, and cannot "claim that which was intended to be given to the assignees "in trust for others. A creditor of the assignor, whether pro- "vided for by the assignment or not, who wishes to repudiate "the trusts of the assignment on the ground that they are il- "legal and a fraud upon the honest creditors of the assignor, "must apply to set aside the assignment as fraudulent and void,

"against him as a creditor, instead of coming in under the as-
"signment itself, as a preferred creditor or otherwise."

30 Ark., Frierson vs. Branch, 453-465; 32 Ark., Pichitt vs. Merchant Bank, 346; 8 Ch. App. Cas., Codington vs. Lindsay, 578; 593; 3 Wis., Geisse vs. Butt, 350-357; 7 Heisk., Swanson vs. Tarkington, 612; 7 Paige, Pratt vs. Adams, 615; 3 Paige, Ontario Bank vs. Root, 478; 2 Ves. Jr., Wilson vs. Lord Townsend, 697; Bispham's Prin. Eq. sec. 295, 306; Perry on Trusts, sec. 596; 2 Pomeroy's Eq. Jur. sec. 916; 1 Jarman on Wills (1881), 443; 8 Leigh, Kinniard vs. Williams, 402-3-4.

We submit that the doctrine is settled beyond dispute, and that the application of the doctrine to this case is as little doubtful as the doctrine.

The statement of the Master of the Rolls in Kidney vs. Coussmaker, 12 Ves., 154, and referred to in note to sec. 1092 of Story's Equity Jurisprudence, that the doctrine of election is not applicable to creditors, was unwarranted by the case in question, and is clearly opposed to the authorities. It is discussed on pages 309-10 of 1 Lead. Cas. in Equity, Hare & Wallace's Notes, and shown to be in conflict with the well recognized law upon the subject. The case of a devise under a will for the payment of debts not barring the creditors from asserting their claims for any deficiency, should the devise prove insufficient, is distinguishable from the general class of cases and from this case upon the plainest grounds. A number of the authorities cited by us apply the doctrine to just such cases as the case at bar, and the doctrine is asserted in the most unmistakable terms.

The Property Traced.

If the plaintiff is put to his election, as we think we have shown, it is useless to discuss the question of the amount of property traced, or of constructive notice to the trustees.

But we will briefly call the attention of the Court to the following facts in regard to the property found by the decree to have been traced, viz:

That the first item, being a piece of real estate, was bought in May, 1876, as found by the decree; that the item of Seaboard and Roanoke Railroad stock was bought in eighteen hundred and seventy-nine (1879), as found by the decree; and that the item of Ocean View Railroad and Hotel Company stock, found by the decree to have bought in October, 1880, was, according to the testimony, purchased "in 1879 or 1880" (see R. T. K. Bain's testimony, answer to question 519, page 169, of record, which is the only testimony on the subject); and that accordingly these three items should not be included in the property traced, as the testimony of H. D. Bulkley, the expert witness called by the Receiver, shows that Bain & Bro. had a balance to their credit as late as July 13th, 1880, (see testimony of H. D. Bulkley, answer to question 24, page 236 of record). But the testimony of Henry S. Herman, another of the Receiver's witnesses and an officer of the bank, shows conclusively by "Exhibit X," filed with his answer to question 3, that Bain & Bro. had a balance of $295.13 to their credit on August 31st, 1881, (see record page 394). This "Exhibit X" was made out by this bank officer from the books of the bank, and introduced by the Receiver to show the true state or result of the account at the end of each month for a number of years prior to the failure, embracing Bain & Bro.'s running bank account, their due bills carried in the cash, and any over-due notes or bills on which they were liable; it was the resultant of their liability upon the accounts mentioned at the times specified in

the exhibit. A special exception was taken by the trustees to the Master's report as to the three said items (see record, page 365). We therefore, secondly, assign as error, that the decree included among the property traced the items of property before referred to.

Notice to Trustees.

But further, the trustees being under the law of Virginia purchasers for value, take free from any claim of the bank unless they had notice of it.

And we submit that no notice whatever can be imputed to them; and we therefore assign as third ground of error the finding of the decree that the trustees are to be considered as affected by constructive notice as to the traced property.

The tracing of this small amount of property was the result of an examination of the checks and books of Bain & Bro., extending through months, made by two experts, H. D. Bulkley and B. U. Keyser, and a personal examination of the witness, R. T. K. Bain, in connection therewith. The trustees not only had no knowledge of any property being bought with money of the bank; they had no cause to believe or to suspect it. It was by the amended bill filed some months after the original bill in the cause, that the charge was made, and the matter referred to a master for ascertainment. This was the principal subject matter of the amended bill; see paragraph III., pages 32-3 of record.

It is not pretended by the other side that the trustees had any actual notice; and it is as difficult to perceive how they could have had constructive notice.

It must be borne in mind that Bain & Bro. were large bankers, and that when they failed they owed to their de-

positors nearly a million dollars, and that their deposit account had frequently run to twelve hundred thousand dollars and more. They lived and did business in a different city from the Exchange National Bank; their visible property was all in Portsmouth and Norfolk county; they had none in Norfolk city. How is it possible to say that the trustees were put upon any inquiry as to the property traced or failed in their duty in making inquiry? As before stated, it was only after an examination by experts of many months, with checks and books before them, that the fact was ascertained at all. After such an examination the property actually traced is of the value of about $13,000, after deducting the three items referred to in the second assignment of error.

Costs of the Suit.

We further object to the decree, and we assign as fourth ground of error, that it directs the costs of the suit (which are very heavy) to be paid out of the trust subject.

If we are right in holding that the plaintiff is put to his election; that he cannot claim under the deed, and against the deed; that he cannot receive the benefit of the deed as a creditor provided for, and at the same time take the property claimed by him; then what has he accomplished by his suit?

Or if the trustees cannot be held to be affected by constructive notice that any of the traced property was bought with money obtained from the bank then the plaintiff equally fails in his suit.

The costs of the suit, we submit, should be decreed against the plaintiff.

Although we deem the principles involved in this case to

be plain, the questions are raised by the opposing counsel, and we have felt called upon to omit none in the discussion. We fear that we may have discussed some of these questions with unnecessary detail. We must urge as our excuse the insistence of opposing counsel, and the importance of the interests committed to our charge.

RICHARD WALKE,
LEGH R. PAGE,
JAMES ALFRED JONES,
} *Counsel for Trustees.*

In the Supreme Court of the United States.

NO. 1005.

WILLIAM H. PETERS, *Receiver of the Exchange National Bank of Norfolk*, Appellant.

vs.

ROBERT T. K. BAIN, GEORGE M. BAIN, JR., AND JAMES G. BAIN, *late partners under the firm name and style of Bain & Bro., and John T. Griffin, William W. Old, and John B. Jenkins, Trustees, and others*, Appellees.

October Term, 1886.

MOTION TO ADVANCE.

The Appellant, William H. Peters, Receiver of the Exchange National Bank of Norfolk, by his counsel, now moves the Court to advance the hearing of his appeal on the docket of this Court, at this Term, and for the following reasons:

1. This appeal was directed to be taken by the Honorables, the Secretary of the Treasury, and Comptroller of the Currency of the United States, as is shown by the letter of the Comptroller to the Appellant, dated the 14th day of June, 1886, copy whereof is printed herewith, marked exhibit "A."

2. The Appellant is Receiver of the Exchange National Bank of Norfolk, and as the agent of the Comptroller of the Currency, cannot, so long as the suit is pending, wind up the affairs of the said National Bank.

3. The questions at issue in the cause affect the National Bank System and its administration, and are of great importance to the public. The failure of the Exchange National Bank of Norfolk, and of the Appellees Bain & Bro. at the same time, involve large interests on the part of several thousands of persons, depositors of those Banks, who must await the issue of this appeal.

4. The property in dispute is of very great value, consisting of real, personal and mixed assets, and is in danger of depreciation and loss.

Wherefore Appellant prays that this cause may be heard at the beginning of the Term.

T. S. GARNETT,
of Counsel for Appellant.

The Trustees of Bain & Bro., who are appellees in the appeal of William H. Peters, Receiver, &c., and who have taken a cross-appeal from the decree in question, concur in making application to the Court to advance this cause on the docket.

RICHARD WALKE,
of Counsel for Trustees.

[COPY.]

EXHIBIT "A."

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., June 14, 1886.

Sir—By direction of Hon. Chas. S. Fairchild, Acting Secretary of the Treasury, you are hereby required to appeal to the Supreme Court of the United States against the decision recently rendered in the Circuit Court, Eastern District, Virginia, in the case Exchange National Bank vs. Bain & Bro.

In making this appeal you will of course ask for an injunction restraining the assignees from taking any steps in the distribution of the assets of the estate until the appeal can be determined, and in view of the decisions in some other cases, I am sure that this injunction will be granted and that there will be no requirement on the part of the Receiver to give security.

Very respectfully,

[Signed] W. L. TRENHOLM,
Comptroller.

WM. H. PETERS, ESQ.,
Receiver Exchange National Bank, Norfolk, Va.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 476.

JOHN T. GRIFFIN, WM. W. OLD AND JOHN B. JENKINS, TRUSTEES,

vs.

WM. H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK, OF NORFOLK, VA.

Cross-Appeal in Chancery.

Assignment of errors by the appellants, John T. Griffin, Wm. W. Old and John B. Jenkins, Trustees, in the above Cross-Appeal.

RICHARD WALKE,
LEGH R. PAGE,
JAS. ALFRED JONES,

Counsel for Trustees.

IN THE

Supreme Court of the United States.

JOHN T. GRIFFIN, WM. W. OLD AND JOHN B. JENKINS, TRUSTEES,

vs.

WM. H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK, OF NORFOLK, VA.

Cross Appeal in Chancery.

ASSIGNMENT OF ERRORS

BY JOHN T. GRIFFIN, WM. W. OLD AND JOHN B. JENKINS, TRUSTEES.

I. The Circuit Court by its decree found, that certain of the property held by the trustees under the deed of assignment from Bain & Bro., had been purchased with the money of the Exchange National Bank, and that the trustees were to be considered as affected by constructive notice as to such property, and that the

plaintiff, Wm. H. Peters, Receiver, was entitled to have and receive from the trustees so much of said property as he elected to take; and the Court further held, that "by making said election and receiving such property the said Receiver is not to be estopped from receiving the full benefit of the said deed of trust, or the provisions thereof, in favor of the Exchange National Bank, and the Court doth so adjudge, order and decree."

We submit, that the plaintiff cannot take under the deed and against the deed; that he is put to his election to do the one, or the other; and that it was error to decree, that he could take the property traced, and would not be estopped from receiving the full benefit of the deed.

II. We submit, that there was error in the amount of property found by the Circuit Court by its decree to have been traced.

III. We submit, that there was error in the decree in holding that the trustees are to be considered as affected by constructive notice as to the property traced; the language of the decree in this regard being as follows: "But it further appearing to the Court, for reasons also stated in their said opinion in writing, that as to money of the Exchange National Bank used by Bain & Bro., or any of the members of said firm, in the purchase of property in the hands of the said trustees, and traced into such property, there was a resulting trust and equity in favor of the said bank, *of which the said trustees are to be considered as having had constructive notice, &c.*"

IV. We submit that there was error in decreeing the costs of the suit to be paid out of the trust subject; the decree in this regard being as follows: "And the Court doth further adjudge, order and decree, that the costs of this suit be paid out of the trust funds in the hands of the defendant trustees."

If the first assignment of error be decided in favor of the trustees it becomes unnecessary to consider the second or third, as the traced property is insignificant in comparison with the benefit secured under the deed, and the plaintiff, if put to an election, will of course elect to take under the deed. It is equally conclusive of the question of costs, as the plaintiff will have accomplished nothing by his suit, and costs should be decreed against him.

RICHARD WALKE,
LEGH R. PAGE,
JAMES ALFRED JONES,
} *Counsel for Trustees.*